No. 91-1675

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

BERNARD A. ZARDA, SR., et al.,

Petitioners,

vs.

STATE OF KANSAS, et al.,

Respondents,

and

JERRY S. DEAN, et al.,

Petitioners,

vs.

STATE OF KANSAS, et al.,

Respondents.

Petition For Writs Of Certiorari To The Supreme Court Of The State Of Kansas

PETITION FOR WRITS OF CERTIORARI

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QUESTIONS PRESENTED

A. THE *ZARDA* CASE.

WHETHER THE STATE OF KANSAS MAY CONSTITUTIONALLY DENY ACCESS TO ITS COURTS TO OVER A MILLION OF ITS CITIZENS SUBJECTED TO AN ALLEGEDLY UNCONSTITUTIONAL MOTOR VEHICLE TAX SCHEME, THE SUBTLETY OF WHICH HAD NECESSARILY PROHIBITED THEM FROM TIMELY EXHAUSTING THEIR ADMINISTRATIVE REMEDIES?

B. THE *DEAN* CASE.

WHETHER THE STATE OF KANSAS MAY CONSTITUTIONALLY DENY ACCESS TO ITS COURTS TO OVER A MILLION OF ITS CITIZENS SUBJECTED TO A MOTOR VEHICLE TAX SCHEME ADMINISTERED IN ALLEGED VIOLATION OF THE IMPLEMENTING STATUTE AND IN A MANNER SO SUBTLE THAT NO OPPORTUNITY EXISTED FOR THE TIMELY EXHAUSTION OF ADMINISTRATIVE REMEDIES?

C. IN BOTH THE *ZARDA* AND *DEAN* CASES.

WHETHER, UNDER THE FACTS OF THESE CASES, CLASS RELIEF IS REQUIRED TO SATISFY KANSAS CITIZENS' DUE PROCESS RIGHTS?

PARTIES TO THE PROCEEDINGS

A. THE *ZARDA* CASE.

The parties to the proceeding in the Kansas Supreme Court were: (1) Petitioners Bernard A. Zarda, Sr. and Betty M. Zarda; Bernard A. Zarda, Jr. and Karen Zarda; Karen Sneed, a/k/a Karen Zarda; Gary Dean Zuck; Dick Walker and Carol Walker; Donald Watkins; Elizabeth Watkins; Fred J. Watkins; Robert Webster and Kathey Webster; Kurt Weigand; Thomas Weigand; Kim Wagner; Vikki K. Watson; Bill Weakley and Marjorie M. Weakley; Frank Webb; and Douglas Tokes and Carol Tokes, for themselves and all others similarly situated; and (2) Respondents State of Kansas; Kansas Department of Revenue; Ed Rolfs, Secretary of Revenue; Steve Stotts, Director of Taxation; Mike Hayden, Governor of the State of Kansas; The Board of County Commissioners of the County of Franklin; The Board of County Commissioners of the County of Johnson; The Board of County Commissioners of the County of Leavenworth; and The Board of County Commissioners of the County of Wyandotte, for themselves and all others similarly situated.

B. THE *DEAN* CASE.

The parties to the proceeding in the Kansas Supreme Court were: (1) Petitioners Jerry S. Dean and Dana D. Dean; James P. Underwood and Roma Underwood; Michael G. Quinn; E. R. Zook; Bill D. Weakley and Marjorie M. Weakley; Douglas E. Tokes and Carol A. Tokes; Charles Johnson and Leslie Johnson, for themselves and all others similarly situated; and (2) Respondents State of Kansas; Kansas Department of Revenue; Ed Rolfs, Secretary of Revenue; John R. Luttjohann, Director of Property Valuation; Delores Ebling, Treasurer of Atchison County; Linda K. Hamilton, Treasurer of Barber County; Jenneth Hallmark, Treasurer of Barton County; Opal Hess, Treasurer of Bourbon County; Thelma Lance, Treasurer of Brown County; Betty Orr, Treasurer of Butler County; Una Mae Bowman, Treasurer of Chautauqua County; Betty L. McBride, Treasurer of Cherokee

PARTIES TO THE PROCEEDINGS – Continued

County; Gladys Cook, Treasurer of Cheyenne County; Velma Basnett, Treasurer of Commanche County; Patty McDonald, Treasurer of Cowley County; John Kovacic, Treasurer of Crawford County; Pat Fringer, Treasurer of Decatur County; Louise Habacker, Treasurer of Dickinson County; Jacqueline Dawe, Treasurer of Doniphan County; Nancy Hempen, Treasurer of Douglas County; Mary I. Carlson, Treasurer of Edwards County; Mike Billinger, Jr., Treasurer of Ellis County; Dorothy Hunter, Treasurer of Ford County; Marilyn Talbott, Treasurer of Franklin County; Mae Bartlett, Treasurer of Geary County; Cheryl Remington, Treasurer of Gove County; Shirley Scott, Treasurer of Graham County; Joe Riddiough, Treasurer of Grant County; Sheryl Steinkuehler, Treasurer of Gray County; Joy Sawyer, Treasurer of Greeley County; Sue Williams, Treasurer of Greenwood County; Chris Squire, Treasurer of Hamilton County; Carmen Alldritt, Treasurer of Harper County; James H. Reber, Treasurer of Harvey County; Nancy Weeks, Treasurer of Haskell County; Marilyn K. Brown, Treasurer of Jackson County; Carolyn Casebier, Treasurer of Jefferson County; Lynn Scarrow, Treasurer of Jewell County; William E. O'Brien, Treasurer of Johnson County; Holly Lashmet, Treasurer of Kearny County; Elsie Haraldson, Treasurer of Kiowa County; Barbara Goodnight, Treasurer of Labette County; Shirley J. Tate, Treasurer of Leavenworth County; Patricia E. Davey, Treasurer of Linn County; Harvene Hoeb, Treasurer of Logan County; Dora Hartig, Treasurer of Lyon County; Verden A. Harms, Treasurer of Marion County; Carolyn Arganbright, Treasurer of Marshall County; Jerilyn Johnson, Treasurer of McPherson County; Pauline Schroeder, Treasurer of Miami County; Billie L. Lewark, Treasurer of Montgomery County; Patty Carson, Treasurer of Morris County; Lois Hall, Treasurer of Morton County; L. M. Eisenbarth, Jr., Treasurer of Nemaha County; Charla Sands, Treasurer of Neosho County; David Jarvis, Treasurer of Ness County; Sally Breiner, Treasurer of Norton County; Jo Ann Hamilton, Treasurer of Osage County; Kathy Jadwin, Treasurer of Pawnee County; Cheryl Wederski, Treasurer of Rawlins County; Larry R. Tucker, Treasurer of Reno

PARTIES TO THE PROCEEDINGS – Continued

County; R. Eileen King, Treasurer of Riley County; Judy Corley, Treasurer of Russell County; Keith Lilly, Treasurer of Saline County; Lark Speer, Treasurer of Scott County; Jerry McCoy, Treasurer of Sedgwick County; Jo Neese, Treasurer of Seward County; Rita Kline, Treasurer of Shawnee County; Esther Bainter, Treasurer of Sheridan County; Shelby Miller, Treasurer of Sherman County; Harry Jones, III, Treasurer of Smith County; Lynda L. McAllister, Treasurer of Stafford County; Phyllis Kistler, Treasurer of Stanton County; Belva Hickey, Treasurer of Stevens County; Loren L. Hibbs, Treasurer of Sumner County; Donita Applebury, Treasurer of Thomas County; Gary Watson, Treasurer of Trego County; Ella Mae Kraus, Treasurer of Wabaunsee County; Viola M. Rohn, Treasurer of Wallace County; Harriet Scott, Treasurer of Woodson County; and Mary Ladesic, Treasurer of Wyandotte County, Kansas.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES ix

OPINIONS DELIVERED BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASES 3

REASONS FOR GRANTING THE WRITS 8

I. THE TWO KANSAS DECISIONS EACH VIOLATE THE CONTROLLING PRINCIPLES OF PROCEDURAL DUE PROCESS RECENTLY STATED IN *McKESSON v. FLORIDA ALCOHOL & TOBACCO DIV.*, 496 U.S. 18, 110 L.Ed.2d 17, 110 S.Ct. 2238 (1990) 8

A. [THE *ZARDA* CASE.] By Being Denied Access to Class Action Remedies, Over One Million Persons Who Paid Kansas Motor Vehicle Taxes Under Duress Have *No* Post-deprivation Relief Whatsoever From a System-wide Tax Scheme Involving "Subtle" Equal Protection Violations of the Type Forewarned in *Felder v. Casey* 487 U.S. 131 (1988) at 145-146 n.3 8

1. *The Facts Of The Zarda Case Clearly Satisfy The McKesson Standard* 8

2. *Over One Million Kansans Have No Post-deprivation Relief Whatsoever* 16

3. *The Issue Of Mandated Class Relief Raised By This Petition Is Of General Importance* 17

TABLE OF CONTENTS – Continued

4. *The Zarda Opinion Also Misapplied The McNary Case And 42 U.S.C. § 1983* 4

B. [THE *DEAN* CASE.] By Being Denied Access to Class Action Remedies, Over One Million Motor Vehicle Taxpayers in 77 Kansas Counties Have *No* Post-deprivation Relief from 1990 Taxes Collected Under Duress and in "Subtle" Violation of Kansas Law 21

1. *The Zarda Points Apply As Well To Dean* ... 21

2. *The Particular Aspects Of The Dean Case Fully Support This Petition* 22

II. THE ADDITIONAL FEDERAL QUESTIONS PRESENTED SHOULD ALSO BE RESOLVED BY THIS COURT TO PROVIDE AUTHORATIVE GUIDANCE TO ALL STATES OF THE UNION 25

A. The Decisions of *Will v. Michigan Department of State Police,* 491 U.S. 58, 105 L.Ed.2d 45, 109 S.Ct. 2304 (1989) and *McKesson Corporation v. Florida Alcoholic Beverages and Tobacco Div.,* 496 U.S. 18, 110 L.Ed.2d 17, 110 S.Ct. 2238 (1990) Are in Apparent Conflict as Regards Citizens' Rights to Post-deprivation Tax Relief Under 42 U.S.C. § 1983 25

B. Confusion Exists In the States As To When Administrative Remedies Must Be Exhausted In Tax Matters Prior To Recognizing State Jurisdiction Over 42 U.S.C. § 1983 Claims Due To An Apparent Conflict Between *Felder v. Casey,* 487 U.S. 131 (1988) and *Patsy v. Florida Board of Regents,* 457 U.S. 496 (1982), *vis-a-vis Fair Assessment In Real Estate v. McNary,* 454 U.S. 100 (1981) 26

CONCLUSION 30

TABLE OF CONTENTS – Continued

APPENDIX A

Opinion of the Kansas Supreme Court filed February 28, 1992, *Bernard A. Zarda, Sr., et al. v. State of Kansas, et al.*, 1992 WL 38568, ___ Kan. ___, ___ P.2d ___ (1992) A-1

APPENDIX B

Memorandum Decision of the District Court of Shawnee County, Kansas in Case No. 90-CV-1684 dated January 16, 1991 (Unreported) B-1

APPENDIX C

Opinion of the Kansas Supreme Court filed February 28, 1992, *Dean, et al. v. State of Kansas, et al.*, 1992 WL 38574, ___ Kan. ___, ___ P.2d ___ (1992) C-1

APPENDIX D

Amended Journal Entry of the District Court of Johnson County, Kansas in Case Nos. 90-C-14,017 and 91-C-33, dated March 19, 1991 (Unreported) D-1

APPENDIX E

Excerpts of Relevant Kansas Statutes and Administrative Regulations E-1

APPENDIX F

Kansas Attorney General Opinion No. 90-100 – dated August 23, 1990 ..... F-1

APPENDIX G

Affidavit of Donald R. Paxson, C.P.A. G-1

APPENDIX H

Kansas Attorney General Opinion No. 90-115 – dated October 12, 1990 ..... H-1

TABLE OF CONTENTS – Continued

APPENDIX I

Chart I – The *Zarda* Case I-1

Chart II – The *Dean* Case I-2

TABLE OF AUTHORITIES

Cases

Allison v. Board of County Comm'rs. of Johnson County, 241 Kan. 266, 737 P.2d 6 (1987) 14, 24

Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 95 L.Ed.2d 209, 107 S.Ct. 1722 (1987)..... 29

Atchison, Topeka & Santa Fe Railway Co. v. O'Connor, 223 U.S. 280, 56 L.Ed. 436, 32 S.Ct. 216 (1912)..... 10, 26

Baker v. Consolidated Rural H.S. Dist. No.1, 143 Kan. 695, 697, 56 P.2d 109 (1936) 12

Backus v. Chilivis, 236 Ga. 500, 224 S.E.2d 370 (1976)..... 29

Barker v. State of Kansas, 249 Kan. 186, 815 P.2d 46 (1991); *cert. granted*, ___ U.S. ___, 117 L.Ed.2d 129, 112 S.Ct. 963 (1992) [*Oral argument presented March 3, 1992 (Docket No. 91-611)*] 16, 19

Bd. of County Comm'rs. of Osage County v. Schmidt, 12 Kan. App.2d 812, 758 P.2d 254 (1988)..... 28

Board of Trustees v. Greenough, 105 U.S. 527, 26 L.Ed. 1157 (1882)..... 19

Bowen v. City of New York, 476 U.S. 467, 90 L.Ed.2d 462, 106 S.Ct. 2022 (1986) 16, 17

Carpenter v. Shaw, 280 U.S. 363, 74 L.Ed. 478, 50 S.Ct. 121 (1930) 10, 24

Cities Service Oil Co. v. Board of County Comm'rs. of Rice County, 224 Kan. 183, 578 P.2d 718 (1978) 25, 26

TABLE OF AUTHORITIES – Continued

Coit Independence Joint Venture v. Federal Savings and Loan Ins. Corp., 489 U.S. 561, 103 L.Ed.2d 602, 109 S.Ct. 1361 (1989) 16

Coleman v. McLaren, 631 F.Supp. 749 (N.D.Ill. 1985) 23

Dennis v. Higgins, 498 U.S. ___, 112 L.Ed.2d 969, 111 S.Ct. 865 (1991) 20

Dutoit v. Board of Comm'rs. of Johnson County, 233 Kan. 995, 667 P.2d 879 (1983) 14, 24

Fair Assessment in Real Estate Assn v. McNary, 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981). *passim*

Farmers Banshares of Abilene, Inc. v. Graves, et al. 1992 WL 38593, ___ Kan. ___, ___ P.2d ___ (1992) *(Motion for rehearing filed March 19, 1992)*..... 28

Felder v. Casey, 487 U.S. 131, 101 L.Ed.2d 123, 108 S.Ct. 2302 (1988) ..... *passim*

Felten Truck Line v. State Board of Tax Appeals, 183 Kan. 287, 327 P.2d 836 (1958) 4, 14, 15

Hogan v. Musolf, 163 Wis. 2d 1, 471 N.W.2d 216 (1991); *cert. den.* ___ U.S. ___, 116 L.Ed.2d 773, 112 S.Ct. 867 (1992) 27

Honig v. Doe, 484 U.S. 305, 98 L.Ed.2d 686, 108 S.Ct. 592 (1988) 16

Howlett v. Rose, 496 U.S. 356, 110 L.Ed.2d 332, 110 S.Ct. 2430 (1990) 22, 24

James B. Beam Distilling Company v. Georgia, et al., ___ U.S. ___, 111 S.Ct. 2439, 115 L.Ed.2d 481, (1991)..... 19

TABLE OF AUTHORITIES – Continued

Johnston v. Gaston County, 71 N.C. App. 707, 323 S.E.2d 381 (1984) *rev. den.* 313 N.C. 508, 329 S.E.2d 392 (1985) 29

Linderkamp v. Bismark School Dist. No. 1, 397 N.W.2d 76 (N.D. 1986) 29

McKesson Corporation v. Florida Alcoholic Beverages and Tobacco Div., 496 U.S. 18, 110 L.Ed.2d 17, 110 S.Ct. 2238 (1990) ..... *passim*

Miller v. Bauer, 517 F.2d 27 (7th Cir. 1975) 18

Montana National Bank of Billings v. Yellowstone County, 276 U.S. 499, 72 L.Ed. 673, 48 S.Ct. 331 (1928) 16

Nutbrown v. Munn, 311 Or. 328, 811 P.2d 131 (1991) 29

Owner-Operators Independent Drivers Ass'n of America v. State, 209 Conn. 679, 553 A.2d 1104 (1989) 29

Patsy v. Board of Regents of State of Florida, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982) 26, 27

Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 86 L.Ed.2d 628, 105 S.Ct. 2965 (1985) 18

Quern v. Mandley, 436 U.S. 725, 56 L.Ed.2d 658, 98 S.Ct. 2068 (1978) 20

Raschke v. Blancher, 141 Ill. App. 3d. 813, 491 N.E.2d 1171 (1986) 29

State ex rel. Smith v. Miller, 239 Kan. 187, 718 P.2d 1298 (1986) 28

Stufflebaum v. Panethiere, 691 S.W.2d 271 (Mo. 1985) 29

TABLE OF AUTHORITIES – Continued

Tri-County Public Airport Authority v. Morris County Bd. of County Comm'rs., 233 Kan. 960, 666 P.2d 698 (1983) 28

Ward v. Board of County Comm'rs. of Love County, 253 U.S. 17, 64 L.Ed 751, 40 S.Ct. 419 (1920).. 10, 21

Will v. Michigan Department of State Police, 491 U.S. 58, 105 L.Ed.2d 45, 109 S.Ct. 2304 (1989)..... 25, 26

Wilson v. Garcia, 471 U.S. 261, 85 L.Ed.2d 254, 105 S.Ct. 1938 (1985) 19, 24

Zizka v. Water Pollution Control Auth., 195 Conn. 682, 490 A.2d 509 (1985)..... 29

Constitutional Provisions and Statutes

U.S. CONST., art. VI, cl. 2 .....2, 22

U.S. CONST., amend. XIV, § 1.....2, 15, 16

28 U.S.C. § 1257..... 2

28 U.S.C. § 1341..... 20

42 U.S.C. § 1983..... *passim*

Kan. Stat. Ann. § 8-134..... 11

Kan. Stat. Ann. § 8-134a..... 11

Kan. Stat. Ann. § 8-149..... 11

Kan. Stat. Ann. § 60-202..... 14

Kan. Stat. Ann. § 60-223..... 19

Kan. Stat. Ann. 1991 Supp. § 60-513 ..... 19, 24

Kan. Stat. Ann. § 60-801..... 14

TABLE OF AUTHORITIES – Continued

Kan. Stat. Ann. § 60-907 14

Kan. Stat. Ann. § 60-1701 14

Kan. Stat. Ann. 1991 Supp. § 74-2426 ..... 4, 7, 10, 12

Kan. Stat. Ann. § 77-612 ..... 7, 12

Kan. Stat. Ann. § 77-614 ..... 7, 12

Kan. Stat. Ann. § 79-1702 15

Kan. Stat. Ann. 1991 Supp. § 79-2005 ..... *passim*

Kan. Stat. Ann. § 79-5105 22

Kan. Stat. Ann. § 79-5106 11

Kan. Stat. Ann. § 79-5116 11

Kan. Adm. Reg. § 92-51-21 ..... 5, 6, 13

Kan. Adm. Reg. § 92-55-2a 5, 13

Books and Periodicals

103 HARV. L. REV. 1988 (1990) 29

REHNQUIST, WILLIAM H., THE SUPREME COURT – HOW IT WAS, HOW IT IS, (1987) 17

45 WASH. & LEE L. REV. 381 (1988) 28

95 YALE L.J. 414 (1985) 29

No. _____

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JERRY S. DEAN, et al.,

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Petition For Writs Of Certiorari To The Supreme Court Of The State Of Kansas

PETITION FOR WRITS OF CERTIORARI*

Petitioners, on behalf of themselves and all others similarly situated, respectfully petition this Court for a writ of certiorari to the Supreme Court of the State of Kansas in each of two closely related cases decided on February 28, 1992.

* Supreme Court Rule 12.2 permits cases involving "identical or closely related issues" to be combined in one petition.

OPINIONS DELIVERED BELOW

A. THE *ZARDA* CASE. The opinion of the Kansas Supreme Court [App. A] is reported at 1992 WL 38568,

___ Kan. ___, ___ P.2d ___ (1992). The Memorandum Decision of the District Court of Shawnee County, Kansas dated January 16, 1991, [App. B] is unreported.

B. THE *DEAN* CASE. The opinion of the Kansas Supreme Court [App. C] is reported at 1992 WL 38574, ___ Kan. ___, ___P.2d ___ (1992). The Amended Journal Entry of the District Court of Johnson County, Kansas dated March 19, 1991, [App. D] constitutes the decision of that court and is unreported.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a), and the petition is filed within 90 days of the two challenged decisions dated February 28, 1992. Sup. Ct. R. 12.2 permits cases involving "closely related" issues to be combined in one petition.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED*

U.S. CONST., art. VI, cl. 2:

"This Constitution, and the Laws of the United States shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

U.S. CONST., amend. XIV, § 1:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory,

subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

* In accordance with Sup. Ct. R. 14.1(f), the pertinent text of relevant Kansas statutes and regulations is set forth in Appendix E.

STATEMENT OF THE CASES

A. THE *ZARDA* CASE. On February 28, 1992, the Kansas Supreme Court in both *Zarda* and *Dean* upheld lower court decisions denying access to the Kansas judicial system by Kansas citizens seeking post-deprivation relief in the form of refunds of motor vehicle taxes paid under duress – and other relief. In each case, the court held that the trial court had no subject matter jurisdicition, since the plaintiffs (petitioners) had not exhausted administrative remedies.

In *Zarda*, the challenged tax overcharges had been unwittingly and innocently paid by hundreds of thousands of Kansas citizens on an annual basis since 1982, pursuant to an alphabetically graded tax scheme. The Kansas Attorney General found, on August 23, 1990, that the scheme violated the equal protection rights of those persons included in the petitioners' putative class (App. F).[1] Prior to that time, due to the subtlety and complexity of the tax scheme, taxpayers could not reasonably have been expected to know of its unlawfulness to permit the timely filing of administrative tax protests.[2] Pursuant to limitation periods established by Kansas law, no tax protest in a given calendar year may be perfected past

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[1] *Zarda*, R. Vol. I. pp 725-731. All "R" references herein are to the record before the Kansas Supreme Court.

[2] See footnote 3 at 145-146 in *Felder v. Casey*, 487 U.S. 131 (1988) noting that equal protection violations are particularly "subtle."

December 31 of that particular year to challenge the constitutionality of the tax incurred. (See Kan.Stat.Ann. 1991 Supp. 79-2005, App. E-7.) Indeed, the tax protest for a particular year must be made when the vehicle is registered for that year. Therefore, since the unconsitutionality of the tax scheme was not apparent until at least August 23, 1990, all affected persons who had paid taxes on an annual basis since May 1, 1982, had lost all opportunity to exhaust their administrative remedies.

In its *Zarda* opinion, the Kansas Supreme Court established that: (a) the only administrative review procedure available to the taxpayers is provided in Kan.Stat.Ann. 1991 Supp. 79-2005 and Kan.Stat.Ann. 1991 Supp. 74-2426 (App. A-4); (b) such procedure must be initiated by a tax protest made at the time the taxes are paid (App. A-4,5); (c) the protest must identify the exact portion of the overcharge (App. A-5); (d) the time to protest by the petitioners had expired (App. A-4); (e) the Board of Tax Appeals (the Kansas administrative tax review agency) has no authority to address constitutional issues (App. A-10); (f) the petitioners' case turns on the single issue as to the constitutionality of the taxes collected from May 1, 1982 through December 31, 1990 (App. A-3); and (g) the Kansas case of *Felten Truck Lines v. State Board of Tax Appeals,* 183 Kan. 287, 327 P.2d 836 (1958) limits taxpayer class actions to include as class members only those persons who have timely perfected tax protests (App. A-12).

Nevertheless, the Kansas Supreme Court held that the petitioners could have filed tax protests for 1990 taxes and, having failed to exhaust their 1990 administrative remedies, were foreclosed from pursuing a class action on behalf of all affected taxpayers from May 1, 1982, reasoning that the district court had no subject matter jurisdiction of plaintiffs' claims under either state law, or federal law pursuant to 42 U.S.C. § 1983. Since the time to exhaust the administrative remedies had expired, the court found the claims for injunction and declaratory judgment to be moot (App. A-17). Petitioners had sought relief in the nature of mandamus, declaratory judgment, refunds of overcharges, injunction,

accounting, and pursuant to 42 U.S.C. § 1983 (App. B-3,4). The Kansas Supreme Court found that no subject matter jurisdiction existed in the trial court on any of the claims despite the fact the taxes were still being collected under the tax scheme in question when suit was filed – and that the tax scheme was not corrected of its faults until January 1, 1991, over four months after the filing. (App. A-4).[3]

As a result of the Kansas Supreme Court's *Zarda* decision, over one million affected Kansas citizens have no post-deprivation remedies whatsoever available to them through either the administrative or judicial process in the State of Kansas from an allegedly unconstitutional tax scheme which was in effect from May 1, 1982, through December 31, 1990 (Kan.Adm.Reg. 92-51-21 and Kan.Adm.Reg. 92-55-2a, App. E-9, 10).

Consequently, approximately 200 million dollars in alleged tax overcharges have been retained by the tax authorities and remain totally immune from claims for refund.[4]

B. THE *DEAN* CASE. While preparing the *Zarda* case, petitioners' attorneys realized for the first time, after yet another Kansas Attorney General Opinion (No. 90-115)[5] was issued to the Kansas Director of Revenue on October 12, 1990, that the wrong year's mill levies were being applied by the Kansas tax authorities in calculating 1990 motor vehicle taxes.[6] This resulted in apparent overcharges approximating $60 million to over one million citizens in 77 Kansas counties. This phenomenon occurred as a result of state-wide re-

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[3] Petitioners raised the federal questions here presented in their pleadings and pursued them continuously before both the trial court and the Kansas Supreme Court. The trial court's decision granting the respondents' motion to dismiss was appealed to the Kansas Court of Appeals and transferred from the Kansas Court of Appeals to the Kansas Supreme Court. Although the petitioners' motion for class certification was briefed and argued before the trial court, no ruling was made due to the dismissal. App. B-8.

[4] See, Chart I, App. I-1.

[5] See, App. H. See, also, *Dean*, R. Vol. I, pp 641-643.

[6] See, Kan.Stat.Ann. 79-5105 (App. E-7). The Attorney General assumed, however, that the law was being followed.

appraisal causing increased tax bases – and consequential lower mill rates in many counties. Petitioners contend a plain and unambiguous reading of the law required that the 1989 mill levies be applied, while the much higher 1988 levies were in fact being used in the taxation of motor vehicles registered in 1990.

Therefore, an original class action in mandamus was brought in the Kansas Supreme Court on November 29, 1990 seeking immediate correction (prior to the start of 1991 vehicle registration activity) of the alleged unlawful procedure and refunds or credits for 1990 overcharges. By the time the alleged wrong was discovered, most persons had already paid their 1990 taxes without protest.[7] The knowledge gained by the petitioners through their attorneys was not generally known to anyone.

On December 7, 1990, the Kansas Supreme Court dismissed the action stating merely:

> "PETITION FOR WRIT OF MANDAMUS DISMISSED UNDER SUPREME CT [sic] RULE 9.0A.* IF THE VARIOUS CLAIMS OF THE PLAINTIFFS HAVE MERIT, **ADEQUATE RELIEF APPEARS TO BE AVAILABLE IN DIST. CT.**" (Emphasis added.)

Two separate class action suits were then filed immediately and consolidated in the District Court of Johnson County, Kansas. The plaintiffs sought certification of a class of all 1990 motor vehicle taxpayers in the impacted 77 counties and named as defendants the appropriate state and county agencies and officials including the county treasurers of all 77 Kansas counties. The suits sought: (a) mandamus relief; (b) declaratory judgment relief; (c) recovery of tax overpayments; (d) injunctive relief; (e) relief under 42 U.S.C. § 1983; and (b) other relief (App. D-2; App. E-2, 3).

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[7] See, Kan.Adm.Reg. 92-51-21 setting forth the staggered registration system. Under that system all persons whose surnames begin with letters A through R were required to complete their 1990 registrations before October 1, 1990. (App. E-9, 10)

Following motions for summary judgment by the petitioners and motions to dismiss by the respondents, the trial court on March 19, 1991, entered its order agreeing with the petitioners on the merits, but dismissing the case for lack of subject matter jurisdiction "over all claims made" by the petitioners (App. D-2).[8]

Petitioners appealed the dismissal to the Kansas Court of Appeals the next day and respondents cross-appealed the merits decision. On April 12, 1991, the Kansas Supreme Court accepted transfer of the case from the Court of Appeals, and after argument in conjunction with the *Zarda* case on October 22, 1991, rendered its decision on February 28, 1992, upholding the district court's opinion dismissing the case for lack of subject matter jurisdiction of all claims (See, App. C-17 and D-2)[9]

In its decision the Kansas Supreme Court, among other points, noted: (a) the alleged wrongful tax procedure is continuing[10] (App. C-3,4); (b) the county average tax rate (mill levy) in question does not appear on the tax statements and consequently it is "not apparent" to taxpayers whether the law is being followed (App. C-4); (c) petitioners' affidavits establish that they were unaware of the alleged unlawful tax calculation upon paying their taxes (App. C-4); (d) the time to file a tax protest to permit petitioners to exhaust their administrative remedies had expired (App. C-4); (e) the provisions of Kan.Stat.Ann. 1991 Supp. 79-2005, Kan.Stat.Ann. 1991 Supp. 74-2426 and Kan.Stat.Ann. 77-601 et seq. set forth the only administrative review procedures (App. C-6); and (f) petitioners did not follow those procedures (App. C-6).

The court also had before it the uncontroverted affidavit of Donald R. Paxson, a C.P.A. with over 30 years of Kansas

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[8] Petitioners' motion for class certification was fully briefed by all parties, but the trial judge held off certifying the class "at this time" in light of his granting respondents' motions to dismiss. App. D-2.

[9] The federal questions here involved were first raised in the pleadings and have been pursued continuously.

[10] And continues to this day.

tax experience, stating that the ordinary Kansas motor vehicle taxpayer was not reasonably able, from the information provided by the tax statements, to discern that he or she was being overcharged (App. G-2).[11]

As a result of the Kansas Supreme Court's decision in *Dean*, Kansas citizens who were overcharged on motor vehicle taxes paid under duress in 1990 – as was determined to be the case by the District Court of Johnson County, Kansas (App. D) – have no post-deprivation relief whatsoever, of either an administrative or judicial nature.

Consequently, approximately 60 million dollars in alleged tax overcharges have been retained by the tax authorities and remain totally immune from claims for refund.[12]

REASONS FOR GRANTING THE WRITS

I. THE TWO KANSAS DECISIONS EACH VIOLATE THE CONTROLLING PRINCIPLES OF PROCEDURAL DUE PROCESS STATED IN *McKESSON v. FLORIDA ALCOHOL & TOBACCO DIV.*, 496 U.S. 18, 110 L.Ed 2d 17, 110 S.Ct. 2238 (1990).

A. [THE *ZARDA* CASE.] By Being Denied Access to Class Action Remedies, Over One Million Persons Who Paid Kansas Motor Vehicle Taxes Under Duress Since 1982 Have *No* Post-deprivation Relief Whatsoever From a System-wide Tax Scheme Involving "Subtle" Equal Protection Violations of the Type Forewarned in *Felder v. Casey*, 487 U.S. 131 (1988) at 145-146 n.3.

1. *The Facts Of The Zarda Case Clearly Satisfy the McKesson Standard.*

Imagine being a Kansas motor vehicle owner. Your last name starts with the letter "Z" (Zarda). All your life you have

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[11] *Dean*, R. Vol. I, pp 493-495.

[12] See, Chart II, App. I-2. There is no mystery as to the amount of overcharges in the *Dean* case since they are calculated simply by applying the correct mill levy rate to the assessed value of each vehicle, instead of the incorrect rate. The same mathematical overcharge factor applies to every 1990 vehicle transaction in a given county.

been relegated to the end of the line – or back row seating – because of the chance of having been born with a family whose surname begins with the last letter of the alphabet. Under the Kansas staggered registration system you also register your vehicles during the last month of the year. But this is no big deal. By now you're used to being last in such matters.

Then one day in late 1990 it comes to your attention that the Kansas Attorney General has recently rendered an opinion that you have been paying more than most other Kansans for motor vehicle taxes, just because your surname starts with the letter "Z." You feel this is unfair. Your attorneys tell you it is also unconstitutional and that hundreds of thousands of other Kansas citizens have been unknowingly overcharged approximately 200 million dollars by this state-wide tax scheme in effect since May 1, 1982.

Your attorneys advise you that, even so, your claim is too small to justify hiring them at an hourly rate; and that the legal issues are too complex for you, without legal assistance, to pursue the administrative tax protest procedures in 1990. You are also advised that it is too late for you to challenge the excessive taxes you already paid innocently in years 1982 through 1989. However, your attorneys advise you they would take the case on a contingent basis if you would choose to serve as representative of a class of all persons similarly impacted by the tax scheme. You agree. Suit is brought and the case proceeds to the Kansas Supreme Court.

You are finally advised by your attorneys that your case has been dismissed and no one has any opportunity to recover one cent. You were too late, even though you talked to your attorney as soon as you learned of your claim.

Incredibly, the Kansas Supreme Court decision in *Zarda* totally evaded the constitutional due process standards of *McKesson* leaving Mr. Zarda and approximately 1.5 million other Kansans out in the cold by simply concluding that no district court jurisdiction existed. The court stated:

> "The plaintiffs have failed to demonstrate how the remedies provided by K.S.A. 1991 Supp. 79-2005

> and K.S.A. 74-2426 are unclear, uncertain, incomplete, or inadequate. The plaintiffs could have complied with K.S.A. 1991 Supp. 79-2005 and still have pursued their constitutional claims. Although constitutional claims cannot be acted upon by BOTA, such claims would be resolved by the district court on appeal."[13]

Yet, this Court in *McKesson* has required that:

> "When a State penalizes taxpayers for failure to remit their taxes in timely fashion, thus requiring them to pay first before obtaining review of the tax's validity, federal due process principles long recognized by our cases require the State's post-deprivation procedure to provide a '**clear and certain remedy**' [citation omitted] **for the deprivation of tax moneys in an unconstitutional manner**."[14] (Emphasis added.) 100 S.Ct. at 2258.

In concluding that prospective relief alone was insufficient, this Court reasoned that "the Due Process Clause of the Fourteenth Amendment obligates the State to provide **meaningful backward-looking relief** to rectify any unconstitutional deprivation." *Id.* at 2247 (citation omitted).[15] (Emphasis added.)

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[13] App. A-15,16.

[14] While the *McKesson* case dealt with taxpayers' rights in a § 1983 context, this Court has long recognized the general constitutional context of taxpayers' post-deprivation rights and that: "**a denial by a state court of a recovery of taxes** in violation of the laws or Constitution of the United States by compulsion **is itself** in contravention of the Fourteenth Amendment." (Emphasis added.) *Carpenter v. Shaw*, 280 U.S. 363, 369 (1980) citing *Ward v. Board of County Comm'rs. of Love County*, 253 U.S. 17 (1920). See, also, *Atchison, T. & S.F. Ry. v. O'Connor*, 223 U.S. 280 (1912).

[15] Respondents in both *Zarda* and *Dean* argued below that they had relied on the presumed validity of the challenged tax system and that the granting of petitioners' claims would create chaos in state and local government – implying that if the tax officials created a large enough of a mess that individual Constitutional rights could be overlooked. This Court, in *McKesson* precluded the state's equitable defenses of "good faith reliance on a presumptively valid statute" and prevention of "serious economic and administrative dislocation for the State." 110 S.Ct. at 2254 (quoting *McKesson*, 524 So. at 1010) and at 110 S.Ct. 2257 [quoting Brief for Respondents on Reargument at 20, *McKesson* (No. 88-192)].

The *Zarda* facts clearly establish that the *McKesson* requirement of available "clear and certain" post-deprivation relief was not met by available Kansas procedures. The Kansas court's decision is palpably wrong for the following reasons:

(a) The state of Kansas penalizes its citizens for failure to remit motor vehicle taxes in a timely fashion by: (1) prohibiting them from driving vehicles until the taxes are paid contemporaneously with the annual vehicle registration[16], (2) making it a crime to drive an unregistered motor vehicle[17] and (3) assessing a lien on the citizen's property for unpaid or delinquent taxes.[18]

(b) The state of Kansas requires payment of the taxes prior to providing any right to challenge the tax's validity.[19]

(c) The nature of the challenge is that the staggered registration and tax scheme in effect since May 1, 1982, violated the Fourteenth Amendment rights of equal protection of the petitioners and all others "similarly situated;"

(d) This Court, in *Felder v. Casey,* specifically recognized the fact that subtle rights violations can result in the passing of unduly short limitations periods before the right is reasonably recognized, by stating:

> "Moreover, many other deprivations, such as those involving denial of due process **or of equal protection**, will be far more **subtle**. In the latter, and by no means negligible, category of constitutional injuries, **victims will frequently fail to recognize** . . . **that they have**

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16 Kan.Stat.Ann. 79-5106, App. E-7, 8.

17 Kan.Stat.Ann. 8-134, 8-134a & 8-149, App. E-1.

18 Kan.Stat.Ann. 79-5116, App. E-8.

19 Kan.Stat.Ann. 1991 Supp. 79-2005, App. E-6.

been wronged at all." 487 U.S. 145-146 and n.3. (Emphasis added.)[20]

(e) Kan. Stat. Ann. 1991 Supp. 79-2005 and 74-2426 provide the only administrative relief available to petitioners or other similarly situated taxpayers.[21]

(f) To implement the administrative review procedures of Kan. Stat. Ann. 1991 Supp. 79-2005 and 74-2426, the petitioners and putative class members had to each file tax protests at the time of paying the taxes[22] and state in such protest the exact portion of the alleged overcharge.[23]

(g) No class procedures are provided through the administrative process; only individuals who file timely tax protests may enter the administrative process; and the right to judicial review is limited solely to the individual case of the protesting taxpayer.[24] Consequently, once the administrative

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[20] The Kansas Supreme Court has also previously noted that timely tax protests are frequently unavailable to unsuspecting and trusting taxpayers. In *Baker v. Consolidated Rural H.S. Dist. No. 1*, 143 Kan. 695, 697, 56 P.2d 109 (1936), the Kansas Supreme Court appropriately noted:

> It is matter of common knowledge that taxpayers generally do not investigate the composition of the sums extended on tax rolls against their property. They go to the treasurer's office, inquire the amount of their taxes, and pay. In this instance **the taxpayers . . . had no reason to think they might be bilked as they were, and of course they did not protest.** [Emphasis added.]

[21] *Zarda* opinion, App. A-4; App. E-4, 6.

[22] *Zarda* opinion, App. A-4,5.

[23] *Zarda* opinion, App. A-5. That requirement was impossible as a practical matter for anyone to meet until some reasonable time period after the Kansas Attorney General rendered Opinion 90-100 on August 23, 1990 that the tax scheme was unconstitutional. Since most persons had already registered their vehicles for 1990 by the end of August, it would be the rare person who – in the remaining portion of 1990 would have been knowledgable and able to file a proper and timely tax protest regarding 1990 taxes. The statute (Kan.Stat.Ann. 1991 Supp. 79-2005) requires that the protestant, among other requirements, identify the exact amount of the overcharge.

[24] Kan.Stat.Ann. 77-612 and 77-614, App. E-4, 5.

process is initiated, all opportunity for class relief is lost. Yet the Kansas court, by its *Zarda* decision, barred direct access to the judicial system and class relief by requiring exhaustion of administrative remedies for all claims under both state and federal (§ 1983) law.[25]

(h) Under no circumstances may a person protest a given year's motor vehicle taxes beyond December 31 of that particular year.[26]

(i) The Kansas court acknowledged that the time to protest by the petitioners had expired.[27]

(j) Petitioners had advanced a colorable claim of unconstitutionality as evidenced by the fact that the Kansas Attorney General had rendered an opinion on August 23, 1990, that the tax scheme in question violated taxpayers' Fourteenth Amendment equal protection rights[28]. After the *Zarda* suit was filed in the District Court of Shawnee County, Kansas, on August 27, 1990, the Kansas Attorney General brought an original action in mandamus in the Kansas Supreme Court on October 1, 1990, to force a change in the offending tax scheme.[29]

(k) Petitioners' suit in *Zarda* was filed almost four months before the unlawful tax scheme was corrected.[30] Petitioners sought relief in the nature of

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25 *Zarda* opinion, App. A.

26 Kan.Stat.Ann. 1991 Supp. 79-2005, App. E-6.

27 *Zarda* opinion, App. A-4.

28 App. F. All persons whose surnames start with a letter other than "A" are impacted – with the "U's, Y's, X's and Z's", who register in December, being most affected. See, *Zarda*, R. Vol. I, p. 653.

29 The mandamus action was then dismissed after the offending tax scheme was amended effective January 1, 1991, by the respondent Director of Revenue, Ed Rolfs. Kansas Supreme Court Docket No. 90-65628-5. Kan. Adm. Reg. 92-55-2a, App. E, is the regulation which corrected the offending tax scheme. By this regulation's simplicity it can be seen that the offense could have been easily corrected at any time since its promulgation, effective May 1, 1982.

30 See, Kan.Adm.Reg. 92-55-2a, consisting merely of two paragraphs, amending the offending Kan.Adm.Reg. 92-51-21; App. E-10.

injunction, mandamus, declaratory judgment, tax refunds, attorneys' fees and all other relief including relief under 42 U.S.C. § 1983 *et. seq.*[31]

(l) The challenged tax scheme continued to force tax payments from petitioners and certain putative class members for the rest of 1990.

(m) The record is totally devoid of any evidence that at any time from May 1, 1982 to August 23, 1990 – at the very earliest – petitioners or the public generally had any reasonable basis to know that their Fourteenth Amendment equal protection rights were being violated by the challenged staggered registration and tax scheme.

(n) Even if class procedures were permitted on judicial review of the administrative procedures, the Kansas court in the *Zarda* decision restrictively interpreted the principal Kansas case dealing with tax related class actions to the effect that Kansas case law limits such a class to include only those taxpayers who have filed timely tax protests.[32]

Therefore, the Kansas court's conclusion that the *McKesson* doctrine is inapplicable because "clear and certain" administrative remedies were available to the petitioners and those similarly situated is blatantly erroneous. Clearly, for all claims for tax years 1989 and previous years (through 1982) the time to protest had expired for all offended taxpayers long before they had actual or constructive notice of the existence

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[31] *Zarda* opinion, App. A-3. Kansas recognizes jurisdiction over 42 U.S.C. § 1983 claims: See, *e.g.*, *Dutoit v. Board of County Comm'rs. of Johnson County*, 233 Kan. 995, 667 P.2d 879 (1983) and *Allison v. Board of County Comm'rs. of Johnson County*, 241 Kan. 266, 737 P.2d 6 (1987). Kansas law also expressly permits injunctions against tax officials (Kan.Stat.Ann. 60-907), mandamus (Kan.Stat.Ann. 60-801) and declaratory judgment actions (Kan.Stat.Ann. 60-1701). Further, Kansas has adopted the federal rules of civil procedure abolishing the separate forms of action. (Kan.Stat.Ann. 60-202) See, App. E-1.

[32] See, *e.g.*, *Felten Truck Lines v. State Board of Tax Appeals*, 183 Kan. 287, 327 P.2d 836 (1958) and *Zarda* opinion, App. A-12.

of their claims for refund.[33] At what point the petitioners and putative class members would be charged with constructive notice of their right to protest in 1990 remains an open question in the record. It seems reasonable, however, that the earliest such date would be a point in time at some reasonable period after August 23, 1990 – the date the Kansas Attorney General Opinion No. 90-100 (App. F) was published.

How, therefore, could the *McKesson* requirement of "clear and certain" administrative relief have possibly been met?

Indeed, the Kansas court even acknowledges that the Kansas Board of Tax Appeals ("BOTA") has no authority to address the "single issue" involved in petitioners' suit – constitutionality.[34]

Further, the Kansas court totally closed the door on petitioners' claims by reiterating the fact that the Kansas tax grievance statute, Kan.Stat.Ann. 79-1702, which generally provides limited post-deprivation relief from "clerical errors" and "mistakes" in the tax process discovered within three years, provides no relief to taxpayers making constitutional claims – citing the *Felten Truck Lines case, supra.*[35]

Therefore, it is abundantly clear that the *Zarda* petitioners – and well over one million similarly situated Kansas citizens – have no post-deprivation remedies of any nature whatsoever to challenge a system-wide motor vehicle tax scheme allegedly violating their Fourteenth Amendment equal protection rights from May 1, 1982, through December 31,

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[33] The record reflects that in 1990, over 2 million motor vehicles were registered in Kansas. *Zarda*, R. Vol. I, p. 66. Therefore, it is reasonable to assume that approximately 1.5 million individuals were affected by the challenged tax scheme. The *Dean* opinion acknowledges that between 1 and 1.5 million motor vehicle taxpayers are involved in that case from 77 of 105 counties in 1990. App. C-4. The *Zarda* class would be slightly larger.

[34] *Zarda* opinion, App. A-3,9,10.

[35] *Zarda* opinion, App. A-9,10. Further, Kan. Stat. Ann. 79-1702 expressly excludes its applicability to assessment and valuation issues by stating that Kan.Stat.Ann. 79-2005 et seq. provide the exclusive procedure for pursuing such challenges. See App. E-6.

1990. Not only is the administrative review process unavailable, but the resort to such a process would have been "utterly futile."[36] The Kansas court even recognized the obvious – that the time to protest had expired.[37]

2. *Over One Million Kansans Have No Post-deprivation Relief Whatsoever.*

Under the scenario which the Kansas court expected the *Zarda* petitioners (and over one million others) to follow, only those fortunate few who happened to discern that an overcharge had occurred prior to the end of the year, would have had the opportunity to protest 1990 taxes.[38] Yet, the amounts in question would not justify a lengthy administrative review process and court battle for even such fortunate individuals.[39]

The Kansas court's opinion creates a severe filter – barring the claims of the many, while theoretically allowing claims of a fortunate few. The result is that the state of Kansas may tax as it well pleases without any expectation of being held accountable.[40]

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[36] See, *e.g.*, *Montana Nat'l Bank v. Yellowstone County of Montana*, 276 U.S. 499, 505 (1928); *Coit Independence Joint Venture v. Federal Savings and Loan Ins. Corp.*, 489 U.S. 561, 587 (1989); *Honig v. Doe*, 484 U.S. 305, 326-327 (1988); *Bowen v. New York*, 476 U.S. 467, 485 (1986).

[37] *Zarda* opinion, App. A-4.

[38] Protests for years 1982 through 1989 had already been forever barred.

[39] The *Zarda* petitioners' economic expert, Richard C. Hoyt, Ph.D., estimated total overcharges from May 1, 1982, through December 31, 1990, to approximate $166,574,353, prior to calculating interest. *Zarda*, R. Vol.I, pp. 811-828 at p. 815. Therefore, total refund claims with interest approximate $200,000,000 and the average class member's claim in *Zarda* approximates $133. In *Dean*, the Kansas court acknowledged the average claim to equal approximately $50. App. C-4.

[40] In granting the petition for certiorari in *Barker v. State of Kansas*, ___ U.S. ___, 116 L.Ed. 2d 602, 112 S.Ct. 963 (1992) (*oral argument presented March 3, 1992*), this Court has recently encountered the Kansas Supreme Court's penchant for protecting the public treasury from colorable constitutional violations in the administration of Kansas tax laws. Petitioners respectfully submit that the *Zarda* and *Dean* opinions reflect a tortured further attempt to protect the public treasury from valid taxpayer challenges based on Fourteenth Amendment rights of which only this Court is the ultimate guardian.

3. *The Issue Of Mandated Class Relief Raised By This Petition Is Of General Importance.*

Petitioners believe that the issue raised by this petition concerning the required class relief to satisfy the *McKesson* doctrine, under these facts, is a particularly substantial issue of such general importance as to warrant the granting of this petition.

Mr. Chief Justice Rehnquist has noted that: " . . . there are really only two or three factors comprised in the certiorari decision – conflict with other courts, general importance, and the perception that the decision is wrong in light of Supreme Court precedent."[41] (Emphasis added.) Petitioners submit that this petition satisfies all such considerations. Certainly the rights of well over one million Kansas citizens depend upon the Court's granting of this petition; and the issues raised are of such broad application that state courts generally need to know that *McKesson* means what it says. The *Zarda* opinion should not be permitted to stand as a beacon for the route which states may follow to evade the *McKesson* rule.

Since no relief is otherwise available, the fact that mandated class relief is necessary under the facts of the *Zarda* case is further supported by the following considerations:

(a) Without class relief, the nature of the administrative process (even if it were available) would cull out the claims of most offended taxpayers for reasons totally unrelated to the merits of their claims.[42]

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[41] WILLIAM H. REHNQUIST, THE SUPREME COURT – HOW IT WAS, HOW IT IS (1987) at p.266.

[42] This Court in *Bowen v. City of New York*, 476 U.S. 467 (1986) at 485-486 cautioned against this very eventuality noting: "It also is likely that many [class members] may have been disqualified [by the administrative process] **for reasons having nothing to do with the illegal policy**." The Court also observed: "**We should be especially sensitive to this kind of harm** [the unavailability of adequate administrative remedies] **where the government seeks to require claimants to exhaust administrative remedies merely to enable them to receive the procedure they should have been afforded in the first place**." (Emphasis added.)

(b) Unlike cases which have held class relief to be inappropriate since a determination of the constitutional issue raised by one party would benefit all without a class,[43] neither injunctive relief, nor the recovery of tax refunds by the petitioners alone without a class being authorized would benefit the absent class members. Indeed, even if the petitioners had each individually pursued the futile administrative review process after learning of the Kansas Attorney General's Opinion No. 90-100 on August 23, 1990, and on judicial review of the administrative review process had convinced the court that they were correct that the tax was unconstitutional, they would have had a right to a refund of 1990 taxes only, with no relief for years 1982 – 1989. Further, all others would have no claim recognized for any year whatsoever. There are 22 individual petitioners in the *Zarda* case, many being husband and wife joint vehicle owners. If they each had recovered $500 (to be very liberal) in 1990, that would equal $11,000 – and the state of Kansas would keep $199,989,000 of $200,000,000 of unconstitutionally collected taxes.[44] Is that what *McKesson* permits?

(c) The individual claims of the affected class members are sufficiently small that a class is necessary to make the pursuit of the individual rights of the affected taxpayers economically feasible;[45]

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[43] See, *Miller v. Bauer,* 517 F.2d 27 (7th Cir. 1975).

[44] See, Chart I, App. I-1.

[45] If the total *Zarda* class claims equal $200 million and there are 1.5 million class members, the average claim approximates $133. In a class action arising out of the Kansas courts, this Court appropriately noted:

> Class actions . . . will permit the plaintiffs to pool claims which would be uneconomical to litigate individually. [In such a case] **most of the plaintiffs would have no realistic day in court if a class action were not available**. *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797 (1985) at 809. (Emphasis added.)

A class action, of course, also provides a vehicle for the creation of a common fund from which the offended taxpayers' attorney fees may be secured. See,

(Continued on following page)

(d) In the recent tax refund case of *James B. Beam v. Georgia,* 111 S.Ct. 2439 (1991), this Court recognized the principle that the rule of law should apply to all litigants "similarly situated."[46] The court noted that such a principle is "a fundamental component of *stare decisis* and of the rule of law generally."[47]

(e) Kansas has adopted the federal rules of civil procedure and has the traditional class action procedures in place.[48] This court need only require the Kansas court to make those procedures available to the petitioners and those similarly situated. All requirements of Kan. Stat. Ann. 60-223 can be readily satisfied by the petitioners.[49]

(f) No statute of limitations stands in the way of the claims for refund of the petitioners' and putative class members'.[50]

(Continued from previous page)

Board of Trustees v. Greenough, 105 U.S. 527 (1882). Without such a fund, or the opportunity to recover attorney fees under 42 U.S.C. § 1988, taxpayers with small claims are at the mercy of states which may unconstitutionally skim small amounts of taxes from large numbers of taxpayers. The Kansas Supreme Court, by its holdings in *Zarda* and *Dean*, has effectively prevented taxpayers in future cases from finding attorneys to undertake their cases in system-wide small amount tax abuses of the type here involved.

[46] *Id.* at 2444.

[47] *Id.*

[48] See Kan.Stat.Ann. 60-223, App. E-2.

[49] *Zarda* petitioners' motion of class certification and supporting briefs and exhibits are avilable to this Court in the record. See, *Zarda* R. Vol. I, pp. 127-131; 531-598; 984-990. The same trial court judge who heard the *Zarda* case, Hon. Adrian J. Allen, granted the taxpayers' class motion in *Barker, supra.* He did not decide the class motion in *Zarda.* See, App. B.

[50] There is no applicable statute of limitations in Kansas to bar tax refund claims based on state law going back to May 1, 1982. Under *Wilson v. Garcia,* 471 U.S. 261, 269 (1985), a two year statute of limitations would arguably apply to the § 1983 claim. See, Kan.Stat.Ann. 1991 Supp. 60-513, App. E-2.

4. *The Zarda Opinion Also Misapplied The McNary Case And 42 U.S.C. § 1983.*

The reasoning of *Fair Assessment In Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981) has also been misapplied by the Kansas court to the *Zarda* facts.[51] Principles of comity and policies underlying the Tax Injunction Act[52] are inappropriate to a case in which fundamental Fourteenth Amendment equal protection rights have been raised in state court in reliance on civil rights protected by 42 U.S.C. § 1983. Moreover, the reasons set forth, above, as to why no "clear and certain" post-deprivation remedy is available to the affected Kansas taxpayers under the *McKesson* standard apply, moreover, to the (albeit inappropriate) "plain, adequate and complete" standard of *McNary*.[53] How can the affected taxpayers' rights be "plain, adequate and complete" when no post-deprivation relief whatsoever is available for taxes extracted under duress from May 1, 1982, through December 31, 1990, in a "subtle" system-wide unconstitutional tax scheme?

Further, the Kansas court failed to acknowledge that 42 U.S.C. § 1983 affords affected taxpayers the right to injunctive and declaratory relief – as well as other relief including tax refunds – being "liberally and beneficially construed."[54] The respondents continued to collect the challenged taxes for over four months after the suit was filed. The Kansas court's conclusion that the § 1983 claim was properly dismissed by the trial court runs afoul of this Court's ruling in *Quern v. Mandley*, 436 U.S. 725 (1978) that the withdrawl of an offending program did not moot the claims.[55]

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[51] *Zarda* opinion, App. A-14,15.

[52] 28 U.S.C. § 1341.

[53] 454 U.S. at 116.

[54] See, *e.g.*, *Dennis v. Higgins*, 111 S.Ct. 865, 868 (1991).

[55] *Id.* at 733, n.7.

B. [THE *DEAN* CASE.] By Being Denied Access to Class Action Remedies, Hundreds of Thousands of Motor Vehicle Taxpayers in 77 Kansas Counties Have *No* Post-deprivation Relief From 1990 Taxes Collected Under Duress and in "Subtle" Violation of Kansas Law.

1. *The Zarda Points Apply As Well To Dean*

The issues of the *Dean* case are substantially the same as *Zarda* so far as this petition for certiorari is concerned. The exacting of unlawful taxes by the state and county officials constitutes a Fourteenth Amendment "taking."[56] As such, the *Dean* petitioners have a viable § 1983 claim based on a constitutionally unlawful taking,[57] as well as their state law claims. The *Dean* matter sought the same broad relief sought by the *Zarda* petitioners.[58] The Kansas court made essentially the same erroneous analysis in *Dean* as it did in *Zarda* in concluding that "full and adequate" administrative relief was available, as required by Kansas case law, and that a "clear and certain" or "plain, efficient and complete" administrative remedy was available for § 1983 purposes.[59] Petitioners shall not, therefore, belabor the same points raised regarding

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[56] In *Ward v. Board of County Comm'rs. of Love County*, 253 U.S. 17, 64 L.Ed. 751, 40 S.Ct. 419 (1920) this court stated:

> "To say that the county could collect these unlawful taxes **by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take** or appropriate the **property** . . . **without due process of law**. Of course this would be in contravention of the Fourteenth Amendment, **which binds the county as an agency of the State.**" *Id.*, at 24. [Emphasis added.]

[57] The *Dean* petitioners allege that excessive taxes approximating $60 million were exacted from motor vehicle registrants in 77 Kansas counties in 1990 in direct violation of Kansas law. The trial court in *Dean* agreed that the law was violated. See. App. D-2.

[58] See, Amended Journal Entry of the District Court of Johnson County, Kansas, App. D-2.

[59] *Dean* opinion, App. C.

Zarda, above, but hereby incorporate those points by reference in support of the issuance of a writ of certiorari in the *Dean* case.

2. *The Particular Aspects Of The Dean Case Fully Support This Petition.*

The following additional relevant points apply particularly to the *Dean* case:

(a) In *Dean*, the underlying claim was based on the contention that a clear and unambiguous state law was being misapplied to the detriment of Kansas taxpayers in 1990 – and would continue unless enjoined.[60] This contention was confirmed by the Kansas Attorney General in Opinion No. 90-115 addressed to the respondent, Director of Revenue, Ed Rolfs,[61] and by the trial court judge.[62]

(b) The wrong involved in *Dean* was also of a "subtle" nature of the type forewarned and disapproved in *Felder v. Casey, supra,* as exposing innocent and unwitting citizens to having legitimate claims barred by short notice of claim requirements. It is clear that state imposed jurisdictional limitations cannot stand in the way of the exercise of fundamental rights.[63] The misapplied "county average tax rate"[64] was not reflected on the tax

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[60] App. D-2.

[61] App. H-4. The Attorney General noted: "Thus, while a taxpayer pays for a registration year which spans a part of two calendar years, the mill levy figure required by statute is from one specific calendar year; the year next preceding the date of registration." (Emphasis added.)

[62] The trial court expressly agreed with the *Dean* petitioners on the merits that the 1989 county average tax rates should have been used in 1990, instead of the 1988 rates and that K.S.A. 79-5105 is "clear and not ambiguous." App. D-2. See, also, *Dean* opinion, App. C-3.

[63] U.S. CONST., art. VI, cl. 2; *Howlett v. Rose*, 496 U.S. 356, 110 L.Ed.2d 332, 110 S.Ct. 2430 (1992).

[64] Kan.Stat.Ann. 79-5105(c), App. E-7.

statements[65] and the uncontroverted affidavit of Donald R. Paxson, C.P.A.[66] clearly establishes that a zero term statute of limitations totally barred the opportunity for the affected taxpayers to perfect timely tax protests as a necessary predicate to giving them any post-deprivation relief before their opportunities to timely protest had expired.

(c) In *Zarda*, the court's opinion totally ignored the petitioners' pleas that class relief was necessary to provide either "full and adequate" or "clear and certain" administrative relief under state and federal law respectively – although the argument had been continuously made from the outset of the case and was fully briefed and argued to the Kansas Supreme Court.[67] However, in the *Dean* opinion, the Kansas court – with a somewhat ambiguous reliance upon *Coleman v. McLaren*, 631 F.Supp., 749, 762 (N.D. Ill. 1985) cited by the respondents – found the respondents' argument against the need for class relief to be "persuasive."[68] Frankly, it is impossible to follow the Kansas court's reasoning as to why the unavailability of class relief was not compelled by the *Dean* facts. Petitioners continue to assert that such relief is necessary to satisfy the *McKesson* standard in the cases presented by this petition.

(d) The *Dean* opinion introduced a novel concept of jurisdiction by holding that the petitioners' injunctive and declaratory judgment claims were, somehow, "moot and subject to dismissal for that reason if not for lack of subject matter jurisdiction."[69] Granting that the Kansas Supreme Court can interpret state law as it chooses, nevertheless,

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[65] *Dean* opinion, App. C-4.

[66] App. G.

[67] *Zarda* opinion, App. A.

[68] *Dean* opinion, App. C-13.

[69] *Dean* opinion, App. C-17.

the result of this tortured analysis is itself violative of petitioners' § 1983 rights and of the *McKesson* doctrine.[70] Once the Kansas court acknowledged that § 1983 constitutes the basis for a cause of action in Kansas – as it has done in *Dutoit* and *Allison, supra* – it cannot cut and slice the rights afforded under § 1983 as it chooses.[71] Nevertheless, the *Dean* opinion did just that by holding that the petitioners' claims for declaratory and injuctive relief (which the court acknowledged require no administrative exhaustion) were moot.[72] The unlawful activity, however, continues to this day! Also, the *Dean* opinion violates this Court's rule established in *Wilson v. Garcia, supra*, by establishing a zero statute of limitations period for § 1983 claims, rather than the two year period (after discovery) permitted under Kansas law.[73]

(e) Under the scenario required by the Kansas Supreme Court in *Dean*, only $50 on average would have been recoverable by the eleven *Dean* petitioners – for a total recovery of $550 – while the rest of the $60,000,000 would remain in the public treasury. (See Chart II, App. I-2)

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[70] It clearly violates petitioners' Fourteenth Amendment due process rights. See, *Carpenter v. Shaw*, 280 U.S. at 369.

[71] This court in *Howlett v. Rose*, 496 U.S. 356, 110 L.Ed. 2d 332, 110 S.Ct. 2430 (1992) has recently recognized in a § 1983 context that "the force of the Supremacy Clause is not so weak that it can be evaded by mere mention of the word 'jurisdiction.' *Id.* at 110 L.Ed. 2d 357, 358. The court in *Howett* also noted that the question of **whether a state court is evading federal law** and discriminating against federal causes of action is "**itself a federal question** which we review *de novo.*" *Id.* at 346. (Emphasis added.) See also *Felder v. Casey, supra.*, holding that "enforcement of the notice-of-claim statute in § 1983 actions brought in state court . . . interfer[ed] with and frustrat[ed] the substantive right Congress created." 487 U.S. at 151.

[72] See, *Dean* opinion, App. C-16-17.

[73] See, K.S.A. 1991 Supp. 60-513, App. E-2.

For these reasons, as well as for the reasons set forth in the preceding section addressing the *Zarda* case, petitioners respectfully submit that a writ of certiorari directed to the Kansas court should be granted in *Dean* to compel compliance with the *McKesson* case and to give the petitioners the right to represent a class of taxpayers unknowingly impacted by the alleged misapplication of Kan.Stat.Ann. 79-5105.

II. THE ADDITIONAL FEDERAL QUESTIONS PRESENTED SHOULD ALSO BE RESOLVED BY THIS COURT TO PROVIDE AUTHORITATIVE GUIDANCE TO ALL STATES OF THE UNION.

A. The Decisions of *Will v. Michigan Department of State Police*, 491 U.S. 58, 105 L.Ed. 2d 45, 109 S.Ct. 2304 (1989) and *McKesson Corporation v. Florida Alcoholic Beverages and Tobacco Div.*, 496 U.S. 18, 110 L.Ed. 2d 17, 110 S.Ct. 2238 (1990) are in Apparent Conflict as Regards Citizens' Rights to Post-deprivation Tax Relief Under 42 U.S.C. § 1983.

Lurking just around the corner in both the *Zarda* and *Dean* matters is the question of how the petitioners can enforce the rights denied to them by the Kansas Supreme Court if this court were to reverse – in the face of an apparent barrier to the enforcement of such rights against the state in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989). Respondents, in both cases, have contended that the state and counties are exempt from § 1983 claims, because of *Will*.[74] There does, therefore, appear to be a conflict between

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[74] Under Kansas law the Kansas motor vehicle tax system is centrally operated through the state's computers which are on-line to the individual county treasurers who actually collect the taxes. The allegedly unlawful staggered registration system involved at the heart of both *Zarda* and *Dean*, was initially implemented by the state Department of Revenue, which also advised the county treasurers to use the 1988 "county average tax rate" rather than the lower 1989 rate sought to be applied in *Dean*. Under Kansas law the county treasurers are proper party defendants in tax refund cases, being the officials in charge of the refund payments. See, *Cities Service Oil Company v. Board of County Comm'rs*,

(Continued on following page)

McKesson and *Will* which this petition affords the Court the opportunity to resolve.

Petitioners are confident that the policy underlying the footnote 10 exception noted by this Court in *Will* (105 L.Ed.2d at 58), permitting prospective injunctive relief against state officials acting in an official capacity, would also apply to mandatory relief necessary to effect tax refunds required to protect the petitioners' constitutional rights. Yet, clarification of this apparent conflict would benefit the state courts generally, as well as the *Zarda* and *Dean* litigants and the putative class members.

B. Confusion Exists In the States As To When Administrative Remedies Must Be Exhausted In Tax Matters Prior To Recognizing State Jurisdiction Over 42 U.S.C. § 1983 Claims Due To An Apparent Conflict Between *Felder v. Casey*, 487 U.S. 131 (1988) and *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982), *vis-a-vis Fair Assessment In Real Estate v. McNary*, 454 U.S. 100 (1981).

In both *Zarda* and *Dean* the Kansas court relied on *McNary* to justify its decisions that no original jurisdiction existed in the Kansas judiciary to entertain petitioners' class action state and federal claims.[75] There continues to be confusion in the state courts as to the apparently conflicting decisions of *Felder v. Casey, supra*, and *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982), *vis-a-vis Fair Assessment in Real Estate Ass'n v. McNary, supra*, as regards the nature and extent that state administrative remedies must be exhausted in state court tax challenges seeking 42 U.S.C. § 1983 relief.

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224 Kan. 183, 184, 578 P.2d 718 (1978). Moreover, Justice Oliver Wendell Holmes, Jr. for this Court in *Atchison, T. & S.F. Ry. v. O'Connor*, 233 U.S. at 287 stated, as regards the position of the state official who collected an unlawful tax under duress: "If he had no right, as had not, to collect the money, **his doing so in the name of the State cannot protect him**." (Emphasis added.)

[75] App. A-14,15 and App. C-11,12.

This petition affords this Court the opportunity, in relevant factual contexts, to resolve the apparent confusion and conflict between these two lines of cases.[76]

Felder and *Patsy* each stand for the proposition that states and their courts may not unduly limit citizens' federal rights – including those specifically enforceable under 42 U.S.C. § 1983. As such, those cases would appear to require – where substantial federal rights are involved – that a citizen may pursue a § 1983 claim without exhausting state administrative remedies.

McNary, which antedated both *Patsy* and *Felder*, was clearly applied in an improper manner by the Kansas Supreme Court in both *Zarda* and *Dean* – so far as the exhaustion of administrative remedies requirement is concerned. Arising in the context of federal comity and the Tax Injunction Act, this Court's focus in *McNary* was properly directed toward federal restraint and the policies of states' rights underlying the enactment of the Tax Injunction Act. The Court was split as to the proper concept upon which the federal jurisdictional restraint should be based.[77] Nevertheless, Justice Brennan, in a concurring opinion joined by Justices Marshall, Stevens and O'Connor, was careful – even in the federal jurisdictional context in which the case arose – to carve an exception to the general rule of federal restraint promulgated in *McNary*, by stating:

> "Where administrative remedies are a pre-condition to suit for monetary relief in state court, **absent some substantial consideration compelling a contrary result in a particular case**, those remedies should be deemed a pre-condition to suit in federal court as well.[78] (Emphasis added.)

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[76] See, Petition For A Writ of Certiorari, *Hogan v. Musolf*, 163 Wis.2d 1, 471 N.W. 2d 216 (1991), *cert den.* ___ U.S. ___, 116 L.Ed.2d 773, 112 S.Ct. 867 (1992).

[77] 454 U.S. at 117.

[78] *Id.* at 137.

This exception foresaw the *McKesson*, *Zarda* and *Dean* rights needing federal oversight. Where substantial Constitutional rights are involved, even principles of comity and congressionally mandated federal restraint are over-ridden. Had the *Zarda* and *Dean* petitioners known that the Kansas Supreme Court was going to foreclose all state court and class action access to them, they very well could have initiated their cases in federal court relying principally upon their 42 U.S.C. § 1983 claims. However, at the time the *Zarda* and *Dean* suits were filed, *McNary* posed an apparent barrier – especially in light of the fact that it appeared that Kansas case law itself provided the opportunity for bringing an initial action in state court without exhausting administrative remedies.[79]

The fact that confusion and conflict exists as to the scope and application of *McNary* to state court tax challenges has been noted by legal periodicals and expressed by the state courts, including the Kansas court in *Zarda* and *Dean*.[80]

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[79] The general rule relating to the exhaustion of administrative remedies in Kansas has been repeatedly stated to be as follows:

> The well recognized rule in this state is that where a full and adequate administrative remedy is provided in tax matters by statute, such remedy must **ORDINARILY** be exhausted before a litigant may resort to the courts. [Emphasis added]

See, *Tri-County Public Airport Authority v. Morris County Bd. of County Comm'rs.*, 233 Kan. 960, 666 P.2d 698 (1983); *State ex rel. Smith v. Miller*, 239 Kan. 187, 718 P.2d 1298 (1986) and *Bd. of County Comm'rs. of Osage County v. Schmidt*, 12 Kan. App.2d 812 (1988). Petitioners, consequently, assumed that the rule was not absolute. The *Zarda* and *Dean* opinions make it clear, however, that in tax matters the Kansas court will allow no exceptions, regardless of the *McKesson* standard. See, also, *Farmers Banshares of Abilene, Inc. v. Graves*, 1992 WL 38593, ___ Kan. ___, ___ P.2d (1992), *motion for rehearing filed March 19, 1992*, decided the same day as *Zarda* and *Dean*, citing those cases as justification for denying judicial access to certain income tax challenges and denying class relief.

[80] See, *generally*, *Yuengert, Does The Tax Injunction Act of 1937 Affect State Court Jurisdiction Over State Tax Challenges Under Section 1983 of the Civil Rights Act of 1871?* 45 WASH. & LEE L.REV. 381 (1988); Note, *Clarifying*

(Continued on following page)

Indeed, this Court in *Arkansas Writers' Project, Inc. v. Ragland*[81] recently admitted that:

> "[w]hether state courts must assume jurisdiction over [§ 1983 suits challenging state taxation] is not entirely clear."[82] (Emphasis added.)

Similarly, Justice Kennedy, in *Dennis v. Higgins*,[83] observed:

> "Today's decision raises far more questions about the proper conduct of challenges to the validity of state taxation than it answers."

Petitioners respectfully submit that the *Zarda* and *Dean* cases were incorrectly decided in violation of the *McKesson* standard requiring backward application of post-deprivation tax relief; that *McNary* was also misapplied as partial justification for the Kansas court's holdings; and that this petition should be granted to remedy the injustice rendered below and to afford this Court the opportunity to provide further guidance to taxpayers and state courts, nationwide, seeking guidance in the area of taxpayers' rights in the face of offending state tax schemes.

(Continued from previous page)

Comity: State Court Jurisdiction And Section 1983 State Tax Challenge, 103 HARV. L.REV. 1988, 1895-1908 (1990); Taylor, *Section 1983 in State Court; A Remedy for Unconstitutional State Taxation;* 95 YALE L.J. 414 (1985); *Zizka v. Water Pollution Control Auth.*, 195 Conn. 682, 492 A.2d 509 (1985); *Backus v. Chilivis*, 236 Ga. 500, 224 S.E.2d 370 (1976); *Stufflebaum v. Panethiere*, 691 S.W.2d 271 (Mo. 1985) *(en banc); Johnston v. Gaston County*, 71 N.C. App. 707, 323 S.E.2d 381 (1984) *rev. den.*, 313 N.C. 508, 329 S.E.2d 392 (1985); *Linderkamp v. Bismark School Dist., No. 1*, 397 N.W.2d 76 (N.D. 1986); *Nutbrown v. Munn*, 881 P.2d 137, (Or. 1991); *Raschke v. Blancher*, 141 Ill. App. 3d 813, 491 N.E.2d 1171 (1986); *Owner-Operators Independent Drivers Ass'n of America v. State*, 209 Conn. 679, 553 A.2d 1104 (1989).

[81] 481 U.S. 221 (1987).

[82] Id. at 234, n.7.

[83] 111 S.Ct. 865 (1990) at 880 (Kennedy, J., dissenting).

CONCLUSION

For the foregoing reasons, petitioners urge that writs of certiorari should be granted to the Supreme Court of the State of Kansas in each of the *Zarda* and *Dean* matters.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF KANSAS

No. 66,203

BERNARD A. ZARDA, SR., *et al.*,
Appellants,

v.

STATE OF KANSAS, *et al.*
Appellees.

SYLLABUS BY THE COURT

1.

The well-recognized rule in this state is that where a full and adequate administrative remedy is provided in tax matters by statute, such remedy must ordinarily be exhausted before a litigant may resort to the courts. Following *State ex rel. Smith v. Miller,* 239 Kan. 187, Syl. ¶ 1, 718 P.2d 1298 (1986).

2.

Where there are no issues raised which lend themselves to administrative determination and the only issues present either require judicial determination or are subject to judicial de novo review, it follows that plaintiffs should be permitted to seek court relief without first presenting the case to the administrative agency.

3.

The Board of Tax Appeals is not vested with authority to determine the constitutionality of a statute or administrative regulation.

4.

K.S.A. 1991 Supp. 79-2005 and K.S.A. 1991 Supp. 74-2426 provide plaintiffs seeking tax relief with a clear and certain remedy for full, adequate, and complete relief.

5.

Plaintiffs' prayer in the district court for recovery of monies paid under the staggered tax registration and taxation system for motor vehicles established by K.A.R. 92-51-21 is an attempt to seek tax relief without first exhausting their administrative remedies available under K.S.A. 1991 Supp. 79-2005 and K.S.A. 1991 Supp. 74-2426.

Appeal from Shawnee district court; ADRIAN J. ALLEN, judge. Opinion filed February 28, 1992. Affirmed.

Raymond L. Dahlberg, of Niewald, Waldeck & Brown, of Overland Park, argued the cause, and *Kenton C. Granger* and *Lisa A. Dunbar,* of the same firm, of Kansas City, Missouri, *John C. Frieden* and *Kevin M. Fowler,* of Frieden, Haynes & Forbes, of Topeka, and *James L. Ungerer,* of Overland Park, were with him on the briefs for appellants.

William E. Waters, of Kansas Department of Revenue, argued the cause and was on the brief for appellee Kansas Department of Revenue.

LeeAnne Hays Gillaspie, of Johnson County Legal Department, argued the cause and was on the brief for appellee Board of County Commissioners, Johnson County, Kansas.

The opinion of the court was delivered by

ALLEGRUCCI, J.: The plaintiffs appeal from the order of the district court dismissing their action for mandamus, an accounting, declaratory and injunctive relief, recovery of taxes paid together with interest, and recovery of costs, including attorney fees, under 42 U.S.C. § 1983 (1988). The plaintiffs filed this action as a class action on behalf of taxpayers whose motor vehicle registration month was any month after February. The class was not certified, and plaintiffs' action was dismissed for lack of subject matter jurisdiction due to plaintiffs' failure to exhaust their administrative remedies. The primary defendants are the Kansas Department of Revenue and the Johnson County Board of Commissioners.

The single underlying issue is whether the alphabetical "staggered registration system" for motor vehicle registration and taxation, established by K.A.R. 92-51-21, unconstitutionally discriminated against persons whose registration month was any month after February. The sole issue in this appeal is whether the district court lacked subject matter jurisdiction on the ground that plaintiffs had failed to exhaust administrative remedies.

K.A.R. 92-51-21, which became effective May 1, 1982, established the staggered registration system for motor vehicles. This regulation was adopted as "[a]uthorized by and implementing K.S.A. 1981 Supp. 8-134, 8-134a." Under the system, persons whose last names begin with a letter toward the end of the alphabet paid more in motor vehicle taxes than identically situated taxpayers whose names begin with a letter close to the beginning of the alphabet. This inequality resulted from the differential

availability of depreciation. A new method of computing depreciation eliminated the discrepancies as of January 1, 1991. K.A.R. 92-55-2a. 9 Kan. Reg. 1513 (1990). An original petition in quo warranto filed by the attorney general was voluntarily dismissed upon adoption of this curative regulation.

In October 1989, a memorandum was prepared in the Kansas Legislative Research Department in response to a request for an example of the "application of the motor vehicle tax for two hypothetical taxpayers in the same county who purchase the same new car at the same time, but have surnames at different extremes of the alphabet." On a 1989 model vehicle valued at $15,000 with taxes calculated on a constant mill levy, Mr. T would pay $236 more in taxes during a 5 1/2-year period of ownership than Mr. A would pay. The same example was given in Attorney General Opinion No. 90-100, which concluded that the system violated constitutionally guaranteed equal protection.

K.S.A. 1991 Supp. 79-2005 and K.S.A. 1991 Supp. 74-2426 set out the administrative procedure for protesting the payment of taxes and for recovery of protested taxes. It is uncontroverted that plaintiffs did not follow the procedure. It also is uncontroverted that the time has expired in which named plaintiffs could have followed these procedures for protesting motor vehicle taxes collected before the method of computing depreciation was reformed.

The administrative procedure for a taxpayer's protesting the collection of allegedly unlawful taxes has as its first step, at the time of paying the taxes, the filing of a

written statement with the county treasurer stating the grounds for protest. K.S.A. 1991 Supp. 79-2005(c) provides: "If the grounds of such protest shall be that any tax levy, or any part thereof, is illegal, such statement shall further state the exact portion of such tax which is being protested." The county appraiser must consider the taxpayer's grievance, and the taxpayer may appeal an unsatisfactory result to the State Board of Tax Appeals (BOTA).

K.S.A. 1991 Supp. 74-2426(c)(4) provides that any action of BOTA may be reviewed by the district court of the county in which the property is located. Review must be "in accordance with the act for judicial review and civil enforcement of agency actions," K.S.A. 77-601 et seq. K.S.A. 1991 Supp. 74-2426(c).

K.S.A. 77-612 provides, in pertinent part, as follows: "A person may file a petition for judicial review under this act only after exhausting all administrative remedies available within the agency whose action is being challenged and within any other agency authorized to exercise administrative review." This court's statement of the rule is less rigid: "The well-recognized rule in this state is that where a *full* and *adequate* administrative remedy is provided in tax matters by statute, such remedy must *ordinarily* be exhausted before a litigant may resort to the courts." (Emphasis added.) *State ex rel. Smith v. Miller*, 239 Kan. 187, Syl. ¶ 1, 718 P.2d 1298 (1986).

There is no claim by plaintiffs that they exhausted, or even initiated, the administrative remedies. They argue, however, that, since the administrative remedies available to them are not "full and adequate," it was not necessary for them to do so. Plaintiffs contend that the

district court has not only original jurisdiction of their claims, but also jurisdiction under 42 U.S.C. § 1983.

In support of their contention, plaintiffs argue that the controlling issue is "purely judicial" and the purpose in requiring exhaustion of administrative remedies is not served by deferring the matter to BOTA. In this regard, this court has stated:

> "The doctrine of exhaustion of administrative remedies is directed toward promoting proper relationships between the courts and administrative agencies charged with particular administrative and regulatory duties. It promotes orderly procedure and requires a party to exhaust the administrative sifting process with respect to matters peculiarly within the competence of the agency." *Jenkins v. Newman Memorial County Hospital*, 212 Kan. 92, 95, 510 P.2d 132 (1973).

Under Kansas law, it would be unwarranted for a court to entertain a tax suit on any of these matters of administrative expertise where administrative remedies had not been pursued. Plaintiffs argue, however, that BOTA does not have authority to determine constitutional issues and, therefore, the issues involved in their action are not within the competence or expertise of BOTA. Plaintiffs contend that most of the cases relied upon by defendants for the proposition that exhaustion of administrative remedies is a condition precedent to filing suit in the district court involve challenges to administrative matters. For example, *Tri-County Public Airport Authority v. Board of Morris County Comm'rs*, 233 Kan. 960, 666 P.2d 698 (1983), was an action requesting an exemption from the payment of ad valorem property

taxes assessed against property owned by the Airport Authority but rented to private citizens for various private uses. The plaintiff's claim that its property should enjoy tax-exempt status fell within the administrative agency's sphere of expertise, and the district court was without jurisdiction.

Another case cited by defendants is *State ex rel. Smith,* 239 Kan. 187. There, an action was brought seeking relief based upon a determination that various statutes were unconstitutional. The action was dismissed for plaintiff's failure to exhaust administrative remedies.

In re Appeal of News Publishing Co., 12 Kan. App. 2d 328, 743 P.2d 559 (1987), had as its underlying issue the abatement of a sales tax assessment, but the constitutionality of the imposition on the publisher of the duty to collect the sales tax also was raised. BOTA declined to rule on the constitutionality question because "as a quasi-judicial agency, it had to assume the statutes were constitutional." 12 Kan. App. 2d at 334. The Court of Appeals remarked that "[s]ince administrative boards and agencies may not rule on constitutional questions, the issue of constitutionality must be raised when the case is on appeal before a court of law." 12 Kan. App. 2d at 334.

Defendants also cite two cases for the proposition that BOTA has authority to consider constitutional issues. The first is *Wray v. State Dept. of Revenue,* 224 Kan. 234, 579 P.2d 717 (1978).

Wray attempted to bypass BOTA and appeal an order of the director of taxation to the district court. This court's decision affirming the district court's dismissal is very short and *per curiam.* The taxpayer's issues are not

revealed. It is stated: "Constitutional issues may properly be considered by the state board of tax appeals." The authority cited is *Topeka Cemetery Ass'n v. Schnellbacher,* 218 Kan. 39, 542 P.2d 278 (1975), in which BOTA's decision that a statute classifying cemetery land for tax purposes was constitutional was overturned. There was no issue of the pursuit of administrative remedies, nor any comment by this court as to BOTA's authority to make a determination as to the statute's constitutionality.

In neither *Wray* nor *Topeka Cemetery* is there any discussion of the relative areas of expertise of the administrative and judicial levels. In neither case is it possible to determine whether there were disputed matters which were within the expertise of the administrative agency and were decided before the cases reached the judicial forum on strictly constitutional questions.

Where there are no issues raised which lend themselves to administrative determination and the only issues present either require judicial determination or are subject to judicial de novo review, it follows that plaintiffs should be permitted to seek court relief without first presenting the case to the administrative agency. Whether viewed as a deficiency or inadequacy in the administrative procedure as to the issue on which plaintiffs' case depends or as a matter of the administrative agency's simply not being designed or equipped to handle the issue, the conclusion is the same – there would be no purpose served by requiring plaintiffs to exhaust administrative procedures. See *Beaver v. Chaffee,* 2 Kan. App. 2d 364, 369, 579 P.2d 1217 (1978) (jail conditions). Here, plaintiffs argue that there are no issues requiring the expertise of BOTA. We do not agree.

Although we agree that this case turns on a single constitutional issue, it involves more than just a resolution of that constitutional question. Plaintiffs, in challenging the constitutionality of the regulation, are seeking injunctive, declaratory, and tax relief. It is obvious the purpose and ultimate goal of their challenge is to allow recovery of the motor vehicle taxes paid by them and others. Their challenge is to the regulations adopted by the Department of Revenue in implementing the statutes, which are clearly products of an administrative function.

In *Felten Truck Line v. State Board of Tax Appeals,* 183 Kan. 287, 327 P.2d 836 (1958), this court considered a class action brought by two named plaintiffs and 1,941 named taxpayers challenging the constitutionality of the motor carrier tax statute as well as the interpretation and administration of the Motor Carrier Act by the state commission of revenue and taxation. This was an original proceeding in mandamus, and the writ was allowed in part. The portion of the motor carrier tax statute which charged a tax on the valuation and assessment of certain franchise rights and privileges was found to be unconstitutional. In part, we held: "G.S. 1949, 79-1702 furnishes no remedy to the complaining taxpayers insofar as challenge of the constitutionality of the taxing act itself is concerned." 183 Kan. 287, Syl. ¶ 4.

In so ruling, this court made a distinction between a challenge to the commission's acts in implementing the statute and a challenge to the statute itself. One of the arguments raised by defendants was that "plaintiffs had an adequate remedy at law by way of administrative proceedings under G.S. 1949, 79-1702." 183 Kan. at 293. This court said:

"Insofar as the plaintiffs complain of the commission's valuation of their property and other acts of the commission in its application of the statute, the commission's position is well taken. The commission should not be subjected to litigation in the courts until the alleged error has been called to its attention and it has had an opportunity to consider and correct the grievance. (*Gray v. Jenkins,* 183 Kan. 251, 326 P.2d 319.)

"However, a different situation exists where the tax statute under which the commission is operating is challenged as unconstitutional. G.S. 1949, 79-1702 was not intended to cover a situation where the constitutionality of a tax statute is challenged. The commission is not set up as a court to review the constitutionality of legislative enactments. It is an administrative body. It is the commission's duty to presume that the statutes are constitutional and valid. The plaintiffs had a right to seek court relief on the question of the constitutionality of the statute without first presenting the question to the commission for review." 183 Kan. at 293.

Clearly, based on *Felten* and *In re Appeal of News Publishing Co,* BOTA is not vested with authority to determine the constitutionality of a statute. The statement in *Wray* to the contrary is disapproved. In the typical case in which administrative issues such as assessment were presented to the administrative agency along with a challenge to the constitutionality of a statute, the agency would presume the validity of the statute and apply its expertise to sorting out the assessment question. However, in the present case, plaintiffs are not challenging the constitutionality of the statute, but the regulations

adopted by the Department of Revenue to implement K.S.A. 1981 Supp. 8-134 and -134a. Nonetheless, BOTA's authority is similarly limited in considering a constitutional challenge to a regulation. In *In re Residency Application of Bybee,* 236 Kan. 443, 691 P.2d 37 (1984), Wichita State University appealed the decision of the district court reversing the Faculty Residency Committee's decision denying Bybee residency status. In the appeal to this court, Bybee argued for the first time that the regulations determining residency were unconstitutional. This court, in refusing to consider the issue since it was not raised in the district court, stated: "Since administrative boards and agencies may not rule on constitutional questions, the issue of constitutionality must be raised when the case is on appeal before a court of law." 236 Kan. 443, Syl. ¶ 4.

In the present case, the plaintiffs could have sought a declaratory judgment as to the constitutionality of the regulations and injunctive relief in the district court without first presenting these two issues to BOTA. The district court did have jurisdiction to hear plaintiffs' prayer for a declaratory judgment as to the constitutionality of the staggered registration and taxation system and for a permanent injunction against further utilization of that system.

However, plaintiffs also prayed for recovery of the taxes collected and paid pursuant to the implementation of K.A.R. 92-51-21. Clearly, plaintiffs are seeking tax relief by challenging the regulation adopted by the Department of Revenue in its application of the statute. In *Tri-County,* this court, in noting that K.S.A. 1980 Supp. 79-2005 was part of the 1980 reforms in the tax procedure, said:

> "The 1980 reforms in tax procedure are contained primarily in three statutes. The first is K.S.A. 1980 Supp. 79-2005 which was effective July 1, 1980. The former language in that section, which permitted an aggrieved taxpayer to pay his taxes under protest and then file an action within thirty days in a court of competent jurisdiction, was eliminated. *His sole remedy is now to file an application for refund within the thirty-day period with BOTA. This statutory change achieved the legislative objective of eliminating direct action in the district court, thus channeling all tax matters through BOTA, the paramount taxing authority in the state. Northern Natural Gas Co. v. Dwyer,* 208 Kan. 337, 492 P.2d 147 (1971), *cert. denied* 406 U.S. 967 (1972)." (Emphasis added.) 233 Kan. at 964.

Although in *Felten,* 183 Kan. 287, this court proceeded to determine the constitutionality of the statute, it limited the relief granted by concluding that only those named taxpayers who protested the payment of their taxes were entitled to recover the tax they paid by virtue of this portion of the statute being held unconstitutional. Here, since the plaintiffs did not comply with 79-2005, they cannot seek recovery of their taxes directly in the district court. In *Felten,* we recognized that the acts of an agency in its application of the statute are administrative in nature, and, as such, administrative remedies must first be exhausted. We further recognized that an agency should not be subjected to court action until it has had an opportunity to consider and correct the alleged error. Here, the Department of Revenue eventually did that when the error was brought to its attention by the filing of the quo warranto action by the attorney general.

In *State ex rel. Smith,* 239 Kan. 187, as in the present case, the plaintiff argued that it had no adequate administrative remedy because BOTA had no authority to rule upon the constitutionality of the tax statutes or provide the relief sought by way of mandamus and quo warranto. This court did not agree. In affirming the district court's dismissal, this court observed:

> "A party aggrieved by an administrative ruling is not free to pick and choose a procedure in an action in the district court in order to avoid the necessity of pursuing his remedy through administrative channels. Since the adoption of the act for judicial review and civil enforcement of agency actions (K.S.A. 77-601 *et seq.*), it would appear that relief such as sought here should be raised as new issues in the district court on appeal from the BOTA. See K.S.A. 77-617.
>
> "Although appellant asserts the unconstitutionality of the statutes and seeks extraordinary relief, its obvious complaint is that the assessed valuation of its real property is too high. *This* is an issue that must be determined by exhaustion of administrative remedies before resorting to the courts." (Emphasis added.) 239 Kan. at 190.

Plaintiffs further argue that the exhaustion of state admininstrative [sic] remedies is not required before an action under 42 U.S.C. § 1983 is filed in state courts. Plaintiffs rely on the recent United States Supreme Court decisions in *Felder v. Casey,* 487 U.S. 131, 101 L. Ed. 2d 123, 108 S. Ct. 2302 (1988), and *Patsy v. Florida Board of Regents,* 457 U.S. 496, 73 L. Ed. 2d 172, 102 S. Ct. 2557 (1982). In *Felder,* the Court considered whether a § 1983

action was barred for failing to comply with the Wisconsin notice-of-claim statute. *Patsy* was an employment discrimination case. Neither case involved a challenge to state taxing procedure; therefore, they have limited application in the present case.

Defendants respond that *Fair Assessment in Real Estate Assn. v. McNary*, 454 U.S. 100, 70 L. Ed. 2d 271, 102 S. Ct. 177 (1981), establishes a different rule for state tax cases. *McNary* involved the extension of the prohibition of the Tax Injunction Act to a federal court action seeking damages under § 1983 for a state tax problem. The Court held that principles of comity precluded a federal court from hearing taxpayers' damages actions to redress unconstitutional administration of a state tax system. The Court said: "Such taxpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete, and may ultimately seek review of the state decisions in this Court." 454 U.S. at 116. Justice Brennan, joined by Justices Marshall, Stevens, and O'Connor, concurred based upon the failure of petitioners to exhaust administrative remedies in each tax year for which they sought damages, and not based upon the principles of comity. Justice Brennan's concurring opinion quotes from an earlier opinion setting out the considerations which have led to restraint:

> " 'The special reasons justifying the policy of federal noninterference with state tax collection are obvious. The procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according

> to established rules. State tax agencies are organized to discharge their responsibilities in accordance with the state procedures. If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency.' " 454 U.S. at 137 n.27 (Brennan, J., concurring) (quoting *Perez v. Ledesma*, 401 U.S. 82, 128 n.17, 27 L. Ed. 2d 701, 91 S. Ct. 674 [1971] [Brennan, J., concurring and dissenting]).

His concern leads to the conclusion that "[w]here administrative remedies are a precondition to suit for monetary relief in state court, absent some substantial consideration compelling a contrary result in a particular case, those remedies should be deemed a precondition to suit in federal court as well." 454 U.S. at 137. We conclude that those same concerns logically apply when a federal cause of action (§ 1983) is brought in state court to challenge state taxation.

In the recent case of *McKesson v. Division of Alc. Bev.*, 495 U.S. ___, 110 L. Ed. 2d 17, 110 S. Ct. 2238 (1990), the United States Supreme Court indicated that state post-deprivation tax appeal procedures are constitutional when they provide a "clear and certain remedy." The Court said:

> "When a State penalizes taxpayers for failure to remit their taxes in timely fashion, thus

> requiring them to pay first before obtaining review of the tax's validity, federal due process principles long recognized by our cases require the State's postdeprivation procedure to provide a 'clear and certain remedy' [citation omitted] for the deprivation of tax moneys in an unconstitutional manner." 495 U.S. at ___, 110 L. Ed. 2d at 45.

The plaintiffs have failed to demonstrate how the remedies provided by K.S.A. 1991 Supp. 79-2005 and K.S.A. 1991 Supp. 74-2426 are unclear, uncertain, incomplete, or inadequate. The plaintiffs could have complied with K.S.A. 1991 Supp. 79-2005 and still have pursued their constitutional claims. Although constitutional claims cannot be acted upon by BOTA, such claims would be resolved by the district court on appeal.

Plaintiffs' prayer for recovery of monies paid under the staggered registration and taxation system established by K.A.R. 92-51-21 is an attempt to seek tax relief without first exhausting their administrative remedies available under 79-2005 and 74-2426. We conclude that K.S.A. 1991 Supp. 79-2005 and K.S.A. 1991 Supp. 74-2426 provide plaintiffs with a clear and certain remedy for full, adequate, and complete relief. Thus, the district court did not have jurisdiction to grant such relief, and properly dismissed that part of plaintiffs' action.

Although the district court's order of dismissal for lack of jurisdiction was too sweeping in that it included plaintiffs' prayer for declaratory and injunctive relief, there was nothing to enjoin since the plaintiffs' complaints do not extend to any taxation which occurred after December 31, 1990, and plaintiffs' failure to comply

with 79-2005 precluded their recovery of any taxes paid. Therefore, those actions are moot as to the plaintiffs and should have been dismissed for that reason and not for lack of jurisdiction. A correct ruling will not be reversed because the district court relied upon an incorrect ground or assigned an erroneous reason for its ruling. *State v. Wilburn*, 249 Kan. 678, Syl. ¶ 5, 822 P.2d 609 (1991).

The judgment of the district court is affirmed.

APPENDIX B

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS FOURTH DIVISION

BERNARD A. ZARDA, SR., et al

Plaintiffs

Case No. 90-CV-1684

Vs.

STATE OF KANSAS, et al

Defendants.

MEMORANDUM DECISION

This action arises as a result of the implementation of Kansas Department of Revenue Regulation 92-51-21 providing that, effective May 1, 1982, all motor vehicles and motorized bicycles (other than proportionally registered vehicles, mobile homes, trailers, antique vehicles, and trucks or truck tractors registered for a gross weight of greater than twelve thousand (12,000) pounds) shall be registered annually during one of eleven months under an alphabetically staggered registration and taxation system based on the first letter of the surname of the owner, as follows:

MONTH	FIRST LETTER OF SURNAME
February	A
March	B
April	C, D
May	E, F, G

June	H, I
July	J, K, L
August	M, N, O
September	P, Q, R
October	S
November	T, V, W
December	U, X, Y, Z

The plaintiffs claim that the alphabetically staggered registration and taxation system is unlawfully and unconstitutionally discriminatory against persons, including all of the named plaintiffs, who registered motor vehicles or motorized bicycles for the first time in any month earlier in the same calendar year than the month in which the annual registration for the same motor vehicle or motorized bicycle was also paid as required under the staggered registration system set forth in Kansas Administrative Regulation 92-51-21 throughout the relevant period. The discrimination results in such instances since no depreciation is allowed to such taxpayers on their first two tax events while the person who first registers a vehicle in a month following his or her regular registration month in the calendar year gets to depreciate the vehicle approximately sixteen percent on his or her second tax event.

The plaintiffs bring this action for themselves and all other persons, corporations or other entities similarly situated to redress unlawful and unconstitutional taxation discrimination against those whose surnames happen to start with a letter at the lower end of the alphabet and request that, pursuant to K.S.A. 60-223, they be named the class representatives of a plaintiffs' class consisting of the following:

> "All persons, corporations or other entities registering for the first time one or more motor vehicles or motorized bicycles in Kansas as required under the 'staggered registration system' set forth in K.A.R. 92-51-21 between May 1, 1982 and December 31, 1990 and whose registration month was any month after February."

The plaintiffs further request that the named defendants be designated as class representatives of the defendants' class consisting of the following:

> "The State of Kansas, its departments, agencies, political subdivisions and all counties, cities and other governmental or taxing entities within the state (including but not limited to townships, school, cemetery, drainage, fire department, hospital, library, parks and recreation, sewer and watershed districts) which at any time during the period May 1, 1982 through December 31, 1990 (or such later date as the Court may determine), received money from the taxation of motor vehicles and motorized bicycles in the State of Kansas."

The plaintiffs pray for: (a) all appropriate relief under the principles of mandamus; (b) a declaratory judgment as to the unconstitutionality of the discriminatory monthly staggered registration and taxation system; (c) the recovery of all monies unlawfully collected through the implementation of the monthly staggered registration and taxation system; (d) a permanent injunction against the further implementation and utilization of the discriminatory monthly staggered registration and taxation system; (e) an accounting of all monies unlawfully collected during the relevant time period; (f) the recovery of prejudgment and postjudgment interest, and (g) recovery of

court costs, including reasonable attorneys fees under 42 U.S.C. 1983.

The defendants have all moved for dismissal of this action principally for the reason that this court lacks subject matter jurisdiction, contending that administrative remedies exist to redress the plaintiff's complaints and that the law provides that the plaintiffs must pursue the available administrative remedies before resorting to the court for relief.

The plaintiffs contend, on the other hand, that this Court does have original subject matter jurisdiction of their claims under Kansas law and, further, since this is an action to redress unconstitutional discrimination and taxation of the plaintiffs motor vehicles and motorized bicycles in violation of the Fourteenth Amendment to the United States Constitution, which stated administrative agencies are powerless to consider, this Court also has original subject matter jurisdiction under 42 U.S.C. § 1983, a federal statute under which state courts have concurrent jurisdiction with federal courts to redress violations of constitutional rights.

The plaintiffs rely heavily on the opinion of the Supreme Court of the United States in the recent case of *McKesson Corporation v. Department of Alcoholic Beverages and Tobacco, Department of Business Regulation of Florida*, et al, 495 U.S. ___; 110 L Ed 2d 161 119 S.Ct. 2238 (1990) in which the Court said:

> "When a State penalizes taxpayers for failure to remit their taxes in timely fashion, thus requiring them to pay first before obtaining review of the tax's validity, federal due process principles

> long recognized by our cases require the State's postdeprivation procedure to provide a 'clear and certain remedy,' (citation omitted), for the deprivation of tax moneys in an unconstitutional manner."

In the case of *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100, 70 L Ed 2d 271, 102 S.Ct. 177, (1981) the United States Supreme Court said that 42 U.S.C. § 1983 cut a broad swath and by its terms gave a federal cause of action to prisoners, taxpayers or anyone else whose constitution or federal rights were denied by a state and made no mention of exhaustion of state remedies before resort could be had to the federal courts.

The petitioner in *McNary* alleged that county and state officials deprived them of equal protection and due process of law by unequal taxation of real property and sought damage in the amount of over assessments but the Court held the principal of comity bars taxpayers from asserting 1983 against the validity of tax systems in federal courts and requires taxpayers to seek protection of their federal rights by state remedies, provided the state remedies are plain, adequate and complete.

In the case of *Board of Osage County Commissioners v. Schmidt*, 12 Kan. App 2d 812 (1988) the Court of Appeals of Kansas held that where a taxpayer claimed constructive fraud and made allegations of denial of due process of law and equal protection of the law, the remedy provided in K.S.A. 79-2005 and 74-2426 must be exhausted before the taxpayer may resort to the Court for relief, saying:

> "In K.S.A. 1987 Supp. 79-2005, the legislature has provided a full and adequate remedy for

> Kansas taxpayers who claim the valuation or assessment of their property is illegal or void. The taxpayer is required to pay the taxes under protest and to file a written statement with the county treasurer specifying the grounds of protest, the exact amount of valuation or assessment that the taxpayer admits to be valid, and the exact portion of taxes being protested. K.S.A. 1987 Supp. 79-2005(a), (b). Within thirty days of filing the written protest, the taxpayer must file an application for refund with the Board of Tax Appeals (BOTA). K.S.A. 1987 Supp. 79-2005(e). The taxpayer is afforded a hearing before the BOTA within ninety days of application. K.S.A. 1987 Supp. 79-2005(h). After denial of a motion for rehearing, the final decision of the BOTA may be appealed pursuant to K.S.A. 1987 Supp. 74-2426. The remedy provided in K.S.A. 1987 Supp. 79-2005 and K.S.A. 1987 Supp. 74-2426 is available even to a delinquent taxpayer. See *In re Tax Protest of Rice*, 228 Kan. 600, 620 P.2d 312 (1980)."

In arriving at its conclusions in the *Schmidt* case, the Court of Appeals relied on the opinion of the Supreme Court of Kansas in the case of *Tri-County Public Airport Authority v. The Board of Morris County Commissioners*, 233 Kan. 960 (1983) in which the Court said:

> "The well-recognized rule in this state is that where a full and adequate administrative remedy is provided in tax matters by statute, such remedy must ordinarily be exhausted before a litigant may resort to the courts."

The Court of Appeals also relied on the opinion of the Supreme Court of Kansas in the case of *State ex rel v. Miller*, 239 Kan. 187 (1986) involving a complaint in the ad

valorum tax assessment of certain real property. In the *Miller* case, the taxpayer contended that there was no adequate administrative remedy available since a constitutional issue was involved which was beyond the scope of the authority of the County Board of Equalization and the Board of Tax Appeals. The Supreme Court of Kansas rejected this contention saying:

> "Appellant maintains that it has no adequate administrative remedy because the relief prayed for in its petition is beyond the scope of the authority of either the County Board of Equalization or State Board of Tax Appeals. Linn Valley postulates that the doctrine that requires exhaustion of administrative remedies does not apply in this situation because such procedure would be clearly futile in that the BOTA does not have the authority to rule upon the constitutionality of statutes or provide the relief sought by way of mandamus and quo warranto. We do not agree with appellant's arguments. A party aggrieved by an administrative ruling is not free to pick and choose a procedure in an action in the district court in order to avoid the necessity of pursuing his remedy through administrative channels. Since the adoption of the act for judicial review and civil enforcement of agency action (K.S.A. 77-601 et seq.), it would appear that relief such as is sought here should be raised as new issues in the district court on appeal from the BOTA. See K.S.A. 77-617."

This Court therefore concludes that based upon these authorities, the post deprivation remedy provided by K.S.A. 79-2005 and K.S.A. 74-2426 provides the clear and certain remedy the *McKesson* case requires for the deprivation of tax money in an unconstitutional manner. The

remedy provided for Kansas taxpayers requires the filing of a written protest with the county treasurer at the time the tax is paid. A formal meeting is then scheduled and following notification of the results of the formal meeting, the taxpayer may appeal to the Board of Tax Appeals. The action of the Board of Tax Appeals is subject to review by the district court of the proper county and upon such review constitutional issues can be considered by the court.

The Court further concludes that since the plaintiffs failed to exhaust the administrative remedy provided in K.S.A. 79-2005 this court does not have subject matter jurisdiction.

The motions filed on behalf of the defendants for dismissal of this case are sustained.

The costs are taxed to the plaintiffs. This memorandum shall serve as the journal entry.

DATED this 16th day of January, 1991.

/s/ Adrian J. Allen
Adrian J. Allen, District Judge
Fourth Division District Court

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 66,374

JERRY S. DEAN and DANA D. DEAN, *et al.*,
Plaintiffs/Appellants,

v.

STATE OF KANSAS, *et al.*,
Defendants/Appellees/Cross-Appellants.

JAMES P. UNDERWOOD and
ROMA UNDERWOOD, *et al.*,
Plaintiffs/Appellants,

v.

STATE OF KANSAS, *et al.*,
Defendants/Appellees/Cross-Appellants.

SYLLABUS BY THE COURT

1.

The well-recognized rule in this state is that where a full and adequate administrative remedy is provided in tax matters by statute, such remedy must ordinarily be exhausted before a litigant may resort to the courts. Following *State ex rel. Smith v. Miller,* 239 Kan. 187, Syl. ¶ 1, 718 P.2d 1298 (1986).

2.

In an action to recover motor vehicle registration taxes for 1990 by challenging the Department of Revenue's interpretation of K.S.A. 79-5105, the record is examined and it is *held*: The district court did not err in dismissing the claims of the plaintiffs on the basis that the plaintiffs failed to exhaust their administrative

remedies provided by K.S.A. 1991 Supp. 79-2005 and K.S.A. 1991 Supp. 74-2426.

Appeal from Johnson district court; LARRY McCLAIN, judge. Opinion filed February 28, 1992. Affirmed.

Kenton C. Granger, of Niewald, Waldeck & Brown, P.C., of Kansas City, Missouri, argued the cause, and *Lisa A. Dunbar,* of the same firm, *Raymond L. Dahlberg,* of Overland Park, and *John Frieden* and *Kevin M. Fowler,* of Frieden, Haynes & Forbes, of Topeka, were with him on the briefs for appellants.

William E. Waters, of the Kansas Department of Revenue, argued the cause and was on the brief for appellee Kansas Department of Revenue.

LeeAnne Hays Gillaspie, of the Johnson County Legal Department, argued the cause and was on the brief for appellee Johnson County Treasurer.

Steven R. Wiechman, of Topeka, argued the cause and was on the brief for appellees 62 county treasurers.

Wm. Scott Hesse, of Myers, Pottroff & Ball, of Manhattan, was on the brief for appellee Riley County Treasurer.

John C. Roberts, Assistant Sedgwick County Counselor, was on the briefs for appellee Sedgwick County Treasurer.

Phillip A. Burdick, Brown County attorney, was on the brief for appellee Brown County Treasurer.

David C. VanParys, Leavenworth County Counselor, was on the brief for appellee Leavenworth County Treasurer.

The opinion of the court was delivered by

ALLEGRUCCI, J.: This is an appeal by the plaintiffs from the order of the district court dismissing consolidated civil actions for lack of subject matter jurisdiction based upon the plaintiffs' failure to exhaust administrative remedies. The defendants are the State of Kansas, the Department of Revenue, the Secretary of Revenue, the Director of Property Valuation, the County Treasurer of Johnson County, and the county treasurers of 76 additional counties. In the order of dismissal, the district court expressly found that plaintiffs' complaint was meritorious and that the 1989 county average tax rate should have been used in calculating motor vehicle taxes for 1990. Defendants cross-appeal from that part of the district court's order in which K.S.A. 79-5105 is interpreted.

Subpart (a) of K.S.A. 79-5105 sets forth the procedure for determining the value of motor vehicles; subparts (b) and (c) provide the method for determining the amount of tax to be charged on motor vehicles:

> "(b) multiply the amount determined under (a) by 30% (which shall constitute the taxable value of the motor vehicle); and
>
> "(c) multiply the taxable value of the motor vehicle produced under (b) above by the county average tax rate for the next preceding tax year."

Motor vehicle taxes were first collected under this tag and tax law, as the parties call it, in 1981. At that time the counties were instructed by the Secretary of Revenue to use county average tax rates from 1979 for their calculations of 1981 motor vehicle taxes. In each year since then,

the county average tax rates from two years prior to the collecting year were certified to the counties for use in calculating motor vehicle taxes.

Plaintiffs contend that the county average tax rates for 1989, rather than 1988, should have been used to calculate motor vehicle taxes in 1990. They complain that, as a result of the 1988 rates being used, taxpayers in 77 counties paid more in motor vehicle taxes than they would have if the proper rate had been used. For example, the county average tax rate in Johnson County for 1988 was .177583 and for 1989 was .106749. Plaintiffs assert that the overcharge in 1990 was more than $60 million, and that the number of affected taxpayers is between 1 and 1.5 million. The average overcharge, therefore, is approximately $50.

The county average tax rate is not shown on the motor vehicle statements, and it is not apparent from the statements whether the formula of K.S.A. 79-5105 has been followed. Plaintiffs Jerry Dean, Dana Dean, James Underwood, and Roma Underwood, among others, executed affidavits stating that, at the time they paid 1990 motor vehicle taxes, they were unaware of any overcharge and did not become aware of any overcharge until it was suggested to them by someone else.

K.S.A. 1991 Supp. 79-2005 and K.S.A. 1991 Supp. 74-2426 set out the administrative procedure for protesting the payment of taxes and for recovery of protested taxes. It is uncontroverted that plaintiffs did not follow the procedure. It also is uncontroverted that the time in which the plaintiffs could have followed the procedure for protesting 1990 motor vehicle taxes has expired.

Plaintiffs in the *Underwood* case initially filed in this court an original class action in mandamus on behalf of all motor vehicle taxpayers in the 77 defendant counties. This court dismissed the action on December 7, 1990, under Supreme Court Rule 9.01(a) (1991 Kan. Ct. R. Annot. 41), stating that adequate relief appears to be available in the district court.

A few days after this court's dismissal, the *Underwood* case was filed in Johnson County District Court as a class action on behalf of motor vehicle taxpayers in 77 counties, including Johnson County. The *Dean* case was also filed in Johnson County, and the cases were consolidated; neither class was certified. The class defendants in the *Underwood* case included the county treasurers of the 77 counties.

The single underlying issue in this case is whether taxing authorities acted contrary to K.S.A. 79-5105 in calendar year 1990 by taxing motor vehicles based on the 1988 county average tax rate rather than the 1989 county average tax rate. The issue in this appeal is whether the district court lacked subject matter jurisdiction on the ground that plaintiffs had failed to exhaust administrative remedies. The administrative procedure for a taxpayer's protesting the collection of allegedly unlawful taxes has as its first step, at the time of paying the taxes, the filing of a written statement with the county treasurer stating the grounds for protest. K.S.A. 1991 Supp. 79-2005(c) provides: "If the grounds of such protest shall be that any tax levy, or any part thereof, is illegal, such statement shall further state the exact portion of such tax which is being protested." The county appraiser must consider the taxpayer's grievance, and the taxpayer may

appeal an unsatisfactory result to the State Board of Tax Appeals (BOTA).

K.S.A. 1991 Supp. 74-2426(c)(4) provides that any action of BOTA may be reviewed by the district court of the county in which the property is located. "The parties to the action for judicial review shall be the same parties as appeared before the board in the administrative proceedings before the board." K.S.A. 1991 Supp. 74-2426(c)(l). Review must be "in accordance with the act for judicial review and civil enforcement of agency actions," K.S.A. 77-601 *et seq.* K.S.A. 1991 Supp. 74-2426(c).

K.S.A. 77-612 provides, in pertinent part, as follows: "A person may file a petition for judicial review under this act only after exhausting all administrative remedies available within the agency whose action is being challenged and within any other agency authorized to exercise administrative review." This court has stated the rule in less rigid terms: "The well-recognized rule in this state is that where a full and *adequate* administrative remedy is provided in tax matters by statute, such remedy must *ordinarily* be exhausted before a litigant may resort to the courts." (Emphasis added.) *State ex rel. Smith v. Miller,* 239 Kan. 187, Syl. ¶ 1, 718 P.2d 1298 (1986).

There is no claim by plaintiffs that they exhausted, or even initiated, the administrative remedies. They contend, however, that in the circumstances of this case, it was not necessary for them to do so. They argue that for numerous reasons the administrative remedies in this case are not "full and adequate" or "clear and certain."

Plaintiffs' first reason is that the controlling issue is "purely judicial" in nature and no benefit is gained by deferring the matter to the Department of Revenue or BOTA. The purpose to be served by requiring exhaustion of administrative remedies and the relative functions of the administrative agency and the judiciary were stated by this court in *Jenkins v. Newman Memorial County Hospital,* 212 Kan. 92, 95, 510 P.2d 132 (1973):

> "The doctrine of exhaustion of administrative remedies is directed toward promoting proper relationships between the courts and administrative agencies charged with particular administrative and regulatory duties. It promotes orderly procedure and requires a party to exhaust the administrative sifting process with respect to matters peculiarly within the competence of the agency."

In the realm of taxes, matters of assessment, exemption, equalization, and valuation are administrative in character. See *Symns v. Graves,* 65 Kan. 628, 636, 70 Pac. 591 (1902). Under Kansas law, it would be unwarranted for a court to entertain a tax suit on any of these matters of administrative expertise where administrative remedies had not been pursued.

Most of the cases relied upon by defendants for the proposition that exhaustion of administrative remedies is a condition precedent to filing suit in the district court involve challenges to administrative matters. For example, *Tri-County Public Airport Authority v. Board of Morris County Comm'rs,* 233 Kan. 960, 666 P.2d 698 (1983), was an action requesting an exemption from the payment of ad valorem property taxes assessed against property owned

by the Airport Authority but rented to private citizens for various private uses. The plaintiff's claim that its property should enjoy tax-exempt status fell within the administrative agency's sphere of expertise, and the district court was without jurisdiction.

Another case cited by defendants is *State ex rel. Smith*, 239 Kan. 187. In affirming the district court's dismissal, this court observed: "Although appellant asserts the unconstitutionality of the statutes and seeks extraordinary relief, its obvious complaint is that the assessed valuation of its real property is too high. *This* is an issue that must be determined by exhaustion of administrative remedies before resorting to the courts." (Emphasis added.) 239 Kan. at 190.

Board of Osage County Comm'rs v. Schmidt, 12 Kan. App. 2d 812, 758 P.2d 254, *rev. denied* 243 Kan. 777 (1988), also revolves around the assessment of real property. In a foreclosure action, the Schmidts raised as defenses that their property was assessed at a rate greater than other property in the county and that the appraisal was not based on fair market value. Having failed to bring these administrative matters to the attention of the administrative agency, the Schmidts were prohibited from raising them as defenses in the foreclosure action.

There are other matters which are judicial rather than administrative in character. Construction or interpretation of statutory language is a judicial function. *State ex rel. Stephan v. Kansas Racing Comm'n*, 246 Kan. 708, 719, 792 P.2d 971 (1990). In these matters, the expertise lies with the court rather than the agency. It does not follow, however, that the agency or BOTA is precluded from

interpreting a statute. Interpretation of a statute is a necessary and inherent function of an agency in its administration or application of that statute. In *Kansas Racing Comm'n*, this court said:

> "Usually, the legal interpretation of a statute by an administrative board or agency that is charged by the legislature with the authority to enforce the statute is entitled to great judicial deference. Ordinarily, the court will give deference to the agency's interpretation of the law, but, when reviewing questions of law, the trial court may substitute its judgment for that of the agency. *Kansas Bd. of Regents v. Pittsburg State Univ. Chap. of K-NEA*, 233 Kan. 801, 809, 667 P.2d 306 (1983). In *Kansas Ass'n of Public Employees v. Public Employees Relations Bd.*, 13 Kan. App. 2d 657, 659, 778 P.2d 377 (1989), the Court of Appeals recently held that an agency's interpretation of a challenged statute may be entitled to *'controlling significance* in judicial proceedings' (citing *Pittsburg State*, 233 Kan. at 809).
>
> "This court has recognized that, when a statute is ambiguous, the interpretation placed upon it by an administrative agency whose duties are to carry the legislative policy into effect should be given great weight and may be entitled to controlling significance when the scope and limitations of the powers of the agency must be determined in judicial proceedings. *Cities Service Gas Co. v. State Corporation Commission*, 192 Kan. 707, 714, 391 P.2d 74 (1964); *Southwestern Bell Telephone Co. v. Employment Security Board of Review*, 189 Kan. 600, 607, 371 P.2d 134 (1962)." 246 Kan. at 719-20.

The interpretation of the statute in the present case by the Secretary of Revenue was a necessary administrative act in implementing K.S.A. 79-5105. That interpretation, however, is subject to review as a question of law by the courts. Hence, if the protesting taxpayer exhausts the administrative procedures and raises all issues, including those of statutory construction, at the administrative level, the district court on review is authorized to reconsider and redetermine the construction of that statute. "The district court has authority to construe a statute at variance with BOTA" without "interfer[ing] with the administrative agency's expertise in taxation matters." *In re Order of Board of Tax Appeals,* 236 Kan. 406, 410, 691 P.2d 394 (1984).

Plaintiffs also argue that it is a well-established principle that the exhaustion of state administrative remedies is not required before an action in state court under 42 U.S.C. § 1983 (1988) may be commenced. They cite *Felder v. Casey,* 487 U.S. 131, 101 L. Ed. 2d 123, 108 S. Ct. 2302 (1988); *Patsy v. Florida Board of Regents,* 457 U.S. 496, 73 L. Ed. 2d 172, 102 S. Ct. 2557 (1982); and *Monroe v. Pape,* 365 U.S. 167, 5 L. Ed. 2d 492, 81 S. Ct. 473 (1961).

Plaintiffs attack the administrative procedure set out in 79-2005 and 74-2426 as being inadequate because it does not provide for class-wide relief. Plaintiffs argue that, because of this inadequacy in the administrative remedy, it does not meet the due process requirements of the federal Constitution. An action in the district court where there is a mechanism for processing a class action does pass constitutional muster. Thus, plaintiffs argue, because the only constitutionally adequate remedy available to plaintiffs lies in the district court, there can be no

jurisdictional requirement that they exhaust administrative remedies as a prerequisite to maintaining their class action in the district court.

Defendants respond that post-deprivation tax appeal procedures, such as provided by 79-2005, are constitutional where they provide a "clear and certain remedy." *McKesson v. Division of Alc. Bev.*, 495 U.S. ___, 110 L. Ed. 2d 17, 37, 110 S. Ct. 2238 (1990). Defendants cite *Coleman v. McLaren*, 631 F. Supp. 749, 762 (N.D. Ill. 1985), for the proposition that the lack of class action administrative procedures does not render the administrative remedy inadequate.

Defendants further respond that *Fair Assessment In Real Estate Assn. v. McNary*, 454 U.S. 100, 70 L. Ed. 2d 271, 102 S.Ct. 177 (1981), establishes a different rule for state tax cases. *McNary* involved the extension of the prohibition of the Tax Injunction Act to a federal court action seeking damages under § 1983 for a state tax problem. Justice Brennan, in his concurring opinion, spells out his views of federal/state comity. He stated his concern with the special reasons for the policy of federal noninterference with state taxation and quoted from an earlier opinion setting out the considerations which have led to restraint:

> " 'The special reasons justifying the policy of federal noninterference with state tax collection are obvious. The procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according

> to established rules. State tax agencies are organized to discharge their responsibilities in accordance with the state procedures. If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency.' " 454 U.S. at 137 n.27 (Brennan, J., concurring) (quoting *Perez v. Ledesma*, 401 U.S. 82, 128 n.17, 27 L. Ed. 2d 701, 91 S. Ct. 674 [1971] [Brennan, J., concurring and dissenting]).

His concern leads to the conclusion that "[w]here administrative remedies are a precondition to suit for monetary relief in state court, absent some substantial consideration compelling a contrary result in a particular case, those remedies should be deemed a precondition to suit in federal court as well." 454 U.S. at 137.

Plaintiffs cite *Hogan v. Musolf*, 157 Wis. 2d 362, 459 N.W.2d 865 (1990), which rejects the above reasoning and refuses to "read *McNary* as creating any limitation on sec. 1983 actions in state courts." 157 Wis. 2d at 375 n.9. Defendants cite cases from other states which support Justice Brennan's concern as expressed in *McNary*. See *Owner-Operators Independent Drivers Assn. of America v. State*, 209 Conn. 679, 553 A.2d 1104 (1989); *Raschke v. Blancher*, 141 Ill. App. 3d 813, 491 N.E.2d 1171 (1986); *Stufflebaum v. Panethiere*, 691 S.W.2d 271 (Mo. 1985); and

Johnston v. Gaston County, 71 N.C. App. 707, 323 S.E.2d 381 (1984), *rev. denied* 313 N.C. 508 (1985).

We find the rationales of the cases cited by defendants persuasive. The considerations that have prompted federal court restraint in matters of state taxation also should prompt restraint where a federal cause of action is brought in state court challenging matters of state taxation. At minimum, the federal cause of action should not create the necessity for the state court to forego restraint in such matters.

Coleman, 631 F. Supp. 749, is authority for the proposition that the absence of class-wide remedies does not necessarily mean that the administrative remedy is inadequate. It does not preclude, however, a determination that the absence of a class mechanism in some circumstances may constitute inadequacy.

In *Coleman*, a class action under § 1983 was dismissed for lack of subject matter jurisdiction pursuant to the Tax Injunction Act, 28 U.S.C. § 1341 (1988), which prohibits federal courts dealing with state tax complaints from ordering injunctive relief where state law provides a plain, speedy, and efficient remedy in state court. *McNary*, 454 U.S. 100, extends the prohibition of the injunction statute to federal courts granting damages under § 1983 in state tax cases.

The principal issue for a federal court applying the Tax Injunction Act is federal/state comity, and the general inclination of federal courts to step gingerly in this area is reflected in the overwhelming majority of these cases resulting in deferral to the state tribunals.

In the present case, plaintiffs challenge the interpretation placed on K.S.A. 79-5105 by the Secretary of Revenue. Based upon that challenge, plaintiffs are seeking the recovery of taxes through various state remedies and pursuant to 42 U.S.C. § 1983.

In *Felten Truck Line v. State Board of Tax Appeals*, 183 Kan. 287, 327 P.2d 836 (1958), this court considered a challenge to the constitutionality of the motor carrier tax statute as well as the interpretation and administration of the Motor Carrier Act by the state commission of revenue and taxation. This court made a distinction between a challenge to the commission's acts in implementing the statute and a challenge to the statute itself. One of the arguments raised by defendants was that "plaintiffs had an adequate remedy at law by way of administrative proceedings under G.S. 1949, 79-1702." 183 Kan. at 293. This court said:

> "Insofar as the plaintiffs complain of the commission's valuation of their property and other acts of the commission in its application of the statute, the commission's position is well taken. The commission should not be subjected to litigation in the courts until the alleged error has been called to its attention and it has had an opportunity to consider and correct the grievance. (*Gray v. Jenkins*, 183 Kan. 251, 326 P.2d 319.)" 183 Kan. at 293.

In the present case, plaintiffs' class action petition filed in the district court states that "[t]his action seeks the refund of overcharges and constitutionally unlawful takings by the defendants during calendar year 1990." The purpose of plaintiffs' action is the recovery of the

motor vehicle taxes paid as a result of the Department of Revenue's application of K.S.A. 79-5105. Clearly, plaintiffs are seeking tax relief, and that is the sole objective of their various claims against the defendants. In *Tri-County*, 233 Kan. 960, this court, in noting that K.S.A. 1980 Supp. 79-2005 was part of the 1980 reforms in the tax procedure, said:

> "The 1980 reforms in tax procedure are contained primarily in three statutes. The first is K.S.A. 1980 Supp. 79-2005 which was effective July 1, 1980. The former language in that section, which permitted an aggrieved taxpayer to pay his taxes under protest and then file an action within thirty days in a court of competent jurisdiction, was eliminated. *His sole remedy is now to file an application for refund within the thirty-day period with BOTA. This statutory change achieved the legislative objective of eliminating direct action in the district court, thus channeling all tax matters through BOTA, the paramount taxing authority in the state. Northern Natural Gas Co. v. Dwyer,* 208 Kan. 337, 492 P.2d 147 (1971), *cert. denied* 406 U.S. 967 (1972)." (Emphasis added.) 233 Kan. at 964.

In *State ex rel. Smith,* 239 Kan. 187, the plaintiff argued that it had no adequate administrative remedy because BOTA had no authority to rule upon the constitutionality of the tax statutes or provide the relief sought by way of mandamus and quo warranto. This court did not agree. In affirming the district court's dismissal, this court observed:

> "A party aggrieved by an administrative ruling is not free to pick and choose a procedure in an action in the district court in order to avoid the

> necessity of pursuing his remedy through administrative channels. Since the adoption of the act for judicial review and civil enforcement of agency actions (K.S.A. 77-601 *et seq.*), it would appear that relief such as sought here should be raised as new issues in the district court on appeal from the BOTA. See K.S.A. 77-617. " . . . It appears clear that appellant was not concerned with the constitutionality of the various statutes so long as the tax increases were limited to individual lot owners and appellant was the recipient of preferential tax assessment.
>
> "It is obvious appellant is seeking tax relief without first exhausting the administrative remedies available and which might result in the relief sought. If unsuccessful at the administrative level of the BOTA, appellant will then have the right of appeal to the district court." 239 Kan. at 190-91.

Here, the plaintiffs' claim for recovery of the motor vehicle registration tax is an attempt to seek tax relief without first complying with K.S.A. 1991 Supp. 79-2005. K.S.A. 1991 Supp. 79-2005 and K.S.A. 1991 Supp. 74-2426 provide the plaintiffs with a clear and certain remedy for complete and adequate relief and, therefore, must be complied with before resorting to the courts. The district court properly dismissed the plaintiffs' claims for the recovery of taxes for lack of subject matter jurisdiction.

However, the district court does have original jurisdiction to hear claims for declaratory judgment and injunctive relief without plaintiffs' first complying with K.S.A. 1991 Supp. 79-2005 and K.S.A. 1991 Supp. 74-2426. The plaintiffs' claim for declaratory judgment seeks an order of the district court declaring that "the provisions

of K.S.A. 79-5105 have been violated by the defendants . . . by the utilization of the 1988 county average tax rate of .17758 instead of the 1989 county average tax rate of .10675 in the taxation of motor vehicles registered in Johnson County in 1990." This is a claim brought pursuant to K.S.A. 60-1701 and, if considered separately from the claims for recovery of taxes paid, would not be subject to the requirement of exhaustion of administrative remedies. However, as previously noted, the stated purpose of plaintiffs' case is to recover the motor vehicle registration taxes paid for 1990. All of these various claims are directed toward accomplishing that purpose. The plaintiffs do not separate out their claims for declaratory judgment or injunctive relief or argue these claims should be considered independent of the other claims. Even if treated separately, these claims are limited to the defendants' application of the statute in 1990; therefore, there is nothing to enjoin, and since plaintiffs have failed to comply with K.S.A. 1991 Supp. 79-2005, any determination would be unavailing and have no practical effect as to the real issue presented, which is the recovery of the taxes paid. Therefore, plaintiffs' claims for declaratory judgment and injunctive relief are moot and subject to dismissal for that reason if not for lack of subject matter jurisdiction. In any event, since these claims are moot, they will not be decided on appeal. *State ex rel. Stephan v. Johnson*, 248 Kan. 286, 807 P.2d 664 (1991). The ruling of the district court dismissing all of plaintiffs' claims was correct.

In light of our decision, we need not consider the defendants' cross-appeal.

The judgment of the district court is affirmed.

APPENDIX D

IN THE DISTRICT COURT OF
JOHNSON COUNTY KANSAS

JERRY S. DEAN and DANA D. DEAN; *et al.*, Plaintiffs, vs. STATE OF KANSAS; *et al.*, Defendants.	Case No. 90-C-14,011 (Filed Mar. 19, 1991)
Consolidated in Division 10	
JAMES P. UNDERWOOD and ROMA UNDERWOOD; *et al.*, Plaintiffs, vs. STATE OF KANSAS; *et al.*, Defendants.	Case No. 91-C-33

AMENDED JOURNAL ENTRY

On this 19th day of March, 1991, IT IS BY THE COURT ORDERED as follows:

1. The Court has jurisdiction over the named counties.

2. The Court has not ruled on whether or not all the necessary parties are named in this lawsuit for the awarding of monetary damages for or against the counties.

3. The motions to dismiss for lack of venue are deferred. The Court's ruling on the venue question is a preliminary ruling and is made without prejudice to any party (any party may raise the venue question at some time in the future).

4. The Court finds that K.S.A. 79-5105 is clear and not ambiguous. The Court further finds that the language "next preceding tax year," contained in K.S.A. 79-5105, requires the counties to use the county average tax rate from the calendar year prior to the calendar year in which the registration period falls. For calendar year 1990, 1989 county average tax rates should have been used.

5. The Court grants the motions to dismiss for lack of subject matter jurisdiction over all claims made by the plaintiffs, to wit:

(a) mandamus relief;

(b) declaratory judgment relief;

(c) recovery of tax moneys;

(d) injunctive relief;

(e) 42 U.S.C. 1983 relief;

(f) indirect costs and attorney fees;

(g) all other plaintiffs' claims,

because the plaintiffs have failed to exhaust the administrative remedies prescribed by K.S.A. 79-2005 and K.S.A. 74-2426.

6. Because of the jurisdictional determination of the Court, the Court refuses to certify the class motion at this time.

Pursuant to K.S.A. 1990 Supp. 60-254(b), the Court determines that there is no just reason for delay and expressly directs the entry of a final judgment as to fewer than all the claims.

/s/ Larry McClain
Larry McClain,
District Judge

APPENDIX E

EXCERPTS OF RELEVANT KANSAS STATUTES ANNOTATED

SECTION 8-134: . . . "(b) Every passenger vehicle required by this act to be registered, except as otherwise provided, shall be registered for a period of 12 consecutive months. . . .

(f) The secretary of revenue shall adopt rules and regulations necessary to accomplish the purpose of this Act." (Underlining added.)

SECTION 8-134a: . . . "(a) On and after January 1, 1982, any truck or truck tractor registered for a gross weight of 12,000 pounds or less, motorcycles and motorized bicycles shall be registered or reregistered in accordance with the provisions of subsections (b) and (c) of K.S.A. 8-134. . . .

SECTION 8-149: **"Violation of act; penalty.** It shall be unlawful and constitute a misdemeanor, punishable by a fine not exceeding $2,500, or by imprisonment in the county jail for not less than 30 days nor more than six months, or both such fine and imprisonment, for any person to violate any of the provisions of K.S.A. 8-126 et seq. and amendments thereto, unless a different penalty is by this act otherwise prescribed." (Underlining added.)

* * *

SECTION 60-202: **"One form of action.** There shall be but one form of action to be known as 'civil action', in which the party complaining shall be designated 'plaintiff' and the adverse party 'defendant'."

SECTION 60-223: "Class actions. (a) *Prerequisites to a class action*. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. . . . " (Underlining added.)

SECTION 60-513: "Actions limited to two years. (a) The following actions shall be brought within two years: . . .

(4) Action for injury to the rights of another, not arising on contract and not herein enumerated. . . .

(b) Except as provided in subsection (c), the causes of action listed in subsection (a) shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but in no event shall an action be commenced more then 10 years beyond the time of the act giving rise to the cause of action. . . . " (Underlining added).

SECTION 60-801: Article 8 – MANDAMUS. "Nature of mandamus. Mandamus is a proceeding to compel some inferior court, tribunal, board, or some corporation or person to perform a specified duty, which duty results

from the office, trust or official station of the party to whom the order is directed, or from operation of law."

SECTION 60-907: Article 9 – INJUNCTION – "Illegal acts of public officers. (a) *Illegal tax, charge or assessment.* Injunctive relief may be granted to enjoin the illegal levy of any tax, charge or assessment, the collection thereof, or any proceeding to enforce the same.

(b) *Unauthorized contracts.* Injunctive relief may be granted to enjoin any public officer, board, or body from entering into any contract or doing any act not authorized by law that may result in the creation of an additional levy of a tax, charge or assessment." (Underlining added.)

SECTION 60-1701: Article 17. – DECLARATORY JUDGMENTS. "Jurisdiction; generally. In cases of actual controversy, courts of record within the scope of their respective jurisdictions shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed, and no action or proceedings shall be open to objection on the ground that a judgment or order merely declaratory of right is the only relief requested. Controversies involving the validity or interpretation of deeds, wills, or other instruments of writing, express trusts, statutes, municipal ordinances, and other governmental regulations, may be so determined, and this enumeration does not exclude other instances of actual antagonistic assertion and denial of right." (Underlining added.)

* * *

SECTION 74-2426: " . . . (b)(1) No appeal shall be taken from a final order of the board unless the aggrieved party first files a motion for rehearing of that order with the board and the board has granted or denied the motion.

(2) Within 30 days following a denial of a motion for rehearing or following the certification of any final order of the board upon a decision on rehearing, any aggrieved party to the appeal or proceeding may appeal to: (A) The court of appeals, in cases pertaining to property appraised and assessed by the director of property valuation or excise, income or inheritance taxes assessed by the director of taxation and (B) the district court of the property county, in all other cases. . . .

(4) This statute shall be exclusive in determining appeals taken from all decisions of the board of tax appeals after the effective date of this act and shall exclusively govern the procedure to be followed in taking any appeal from the board of tax appeals from and after that date." (Underlining added.)

* * *

SECTION 77-612: "**Exhaustion of administrative remedies.** A person may file a petition for judicial review under this act only after exhausting all administrative remedies available within the agency whose action is being challenged and within any other agency authorized to exercise administrative review, . . . " (Underlining added.)

SECTION 77-614: "Petition; filing and contents; responsive pleading, filing and service. (a) A petition for judicial review shall be filed with the clerk of the court.

(b) A petition for judicial review shall set forth:

(1) The name and mailing address of the petitioner;

(2) the name and mailing address of the agency whose action is at issue;

(3) identification of the agency action at issue, together with a duplicate copy, summary or brief description of the agency action;

(4) identification of persons who were parties in any adjudicative proceedings that led to the agency action;

(5) facts to demonstrate that the petitioner is entitled to obtain judicial review;

(6) the petitioner's reasons for believing that relief should be granted; and

(7) a request for relief, specifying the type and extent of relief requested.

(c) Within 30 days after the petition is filed, a party to judicial review proceedings may file an answer or other responsive pleading and shall serve a copy of any such answer or pleading in the manner provided by subsection (d) of K.S.A. 77-613 and amendments thereto upon all parties to the proceedings." (Underlining added.)

* * *

SECTION 79-1702: " . . . Errors committed in the valuation and assessment process . . . shall be remediable only under the provisions of K.S.A. 79-2005, and amendments thereto." (Underlining added.)

SECTION 79-2005: "Protesting payment of taxes; written statement of grounds; proceedings for recovery of protested taxes, limitations; refund of protested taxes; taxing districts authorized to issue no-fund warrants; levy of taxes for payment of no-fund warrants. (a) Any taxpayer, before protesting the payment of such taxpayer's taxes, shall be required, either at the time of paying such taxes, or, if the whole or part of the taxes are paid prior to December 20, no later than December 20, to file a written statement with the county treasurer, on forms approved by the director of property valuation and provided by the county treasurer, clearly stating the ground on which the whole or any part of such taxes are protested and citing any law, statute or facts on which such taxpayer relies in protesting the whole or any part of such taxes. . . .

(b) If the grounds of such protest shall be that the valuation or assessment of the property upon which the taxes so protested are levied is illegal or void, such statement shall further state the exact amount of valuation or assessment which the taxpayer admits to be valid and the exact portion of such taxes which is being protested. . . .

(j) If a protesting taxpayer fails to file such application for refund with the board within the time limit prescribed, such protest shall become null and void and of no effect whatsoever." (Underlining added.)

* * *

SECTION 79-5105: "Imposition of tax; amount; computation; minimum tax. A tax is hereby levied upon every motor vehicle, . . . The amount of such tax on a motor vehicle shall be computed by (a) determining the amount representing the midpoint of the values included within the class in which such motor vehicle is classified . . .

(b) multiply the amount determined under (a) by 30% (which shall constitute the taxable value of the motor vehicle); and

(c) multiply the taxable value of the motor vehicle produced under (b) above by the county average tax rate for the next preceding tax year.

The "county average tax rate" for a county means the total amount of general property taxes levied within the county by the state, county and all other taxing subdivisions levying such taxes within such county divided by the total assessed tangible valuation of property within such county as of November 1 of such year as certified by the secretary of revenue." (Underlining added.)

SECTION 79-5106: "Taxes levied annually for registration period; due date; payment condition precedent to registration; change in tax situs. (a) Taxes imposed upon motor vehicles under the provisions of this act shall be levied annually for the period prescribed by article 1 of chapter 8 of the Kansas Statutes Annotated, and amendments thereto, as the registration year for the motor vehicle taxes. . . . the tax upon each motor vehicle shall be due on or before the date in each year prescribed by law for the regular annual registration of such motor vehicle. . . . the payment of the tax imposed by this act shall be a

condition precedent to the right to register or reregister the motor vehicle and shall be in addition to all other conditions prescribed by law. . . . " (Underlining added.)

SECTION 79-5116: "Collection of past due or underpaid motor vehicle taxes; duties of county treasurer and sheriff; judgment liens. Whenever the owner of a motor vehicle subject to taxation under the provisions of article 51 of chapter 79 of the Kansas Statutes Annotated has failed to pay such tax on the applicable due date or has paid less than the full amount of tax due, the county treasurer shall send notice by mail to such owner at such owner's post office address as shown by the records in the office of the county clerk stating the amount of motor vehicle tax charged against the owner and that the same may be paid by paying the amount of tax indicated on the notice and interest the amount of which shall be computed in accordance with the provisions of K.S.A. 79-5114, and amendments thereto. . . .

If such taxes remain unpaid for a period of 30 days after mailing such notice, the county treasurer shall forthwith issue a warrant under the treasurer's hand directed to the sheriff of the county, commanding the sheriff to levy the amount of such unpaid taxes and the amount of the interest thereon, together with the sheriff's fees for collecting the same, upon any personal property, tangible or intangible, of the owner of such motor vehicle. . . . " (Underlining added.)

* * *

EXCERPTS OF RELEVANT KANSAS ADMINISTRATIVE REGULATIONS

92-51-21.: "Staggered registration system. (a) All motorized bicycles and motor vehicles, . . . shall be registered annually under a staggered registration system during one (1) of eleven (11) registration periods. . . .

At the time of registration, the owner shall pay a prorated registration fee equal to one-twelfth (1/12) of the annual registration fee multiplied by the number of months beginning with January, 1982, and ending with, but including, the month of expiration. As a condition precedent to registration, the owner also shall pay a prorated motor vehicle tax as assessed and levied under article 51 of chapter 79 of the Kansas Statutes Annotated. Each registration period shall expire on the last day of the month as prescribed for the alpha letter designation on the plate or decal affixed to the plate as determined by the first letter of the owner's surname in accordance with the following table:

ALPHABETICAL DESIGNATION FOR MONTHLY STAGGERED REGISTRATION

Alpha Letter Designation	Month	First Letter of Surname
A	February	A
B	March	B
C	April	C,D
E	May	E,F,G
H	June	H,I
J	July	J,K,L
M	August	M,N,O
R	September	P,Q,R

Alpha Letter Designation	Month	First Letter of Surname
S	October	S
V	November	T,V,W
X	December	U,X,Y,Z

(Authorized by and implementing K.S.A. 1981 Supp. 8-134, 8-134a; effective, E-82-26, Dec. 16, 1981; effective May 1, 1982.)" (Underlining added.)

* * *

92-55-2a: "Valuation of motor vehicles; allowance for depreciation. (a) When the period for which an owner is seeking to register a motor vehicle covers a portion of two calendar years, the value of a motor vehicle to be registered shall be reduced by taking into account depreciation which is equal to the product determined by multiplying 16% by a fraction, the numerator of which is the number of months in the next succeeding calendar year remaining in the owner's registration year and the denominator of which is 12. The depreciation allowed hereunder shall be in addition to the amounts allowed as reductions in the value of a vehicle pursuant to K.S.A. 79-5105(a).

(b) The method of computing depreciation set forth in subsection (a) shall be applied to all motor vehicles which are registered after January 1, 1991. (authorized by K.S.A. 79-5115; implementing K.S.A. 79-5105; . . .)" (Underlining added.)

APPENDIX F

(SEAL)

STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER,
TOPEKA 66612-1597

ROBERT T. STEPHEN
ATTORNEY GENERAL

MAIN PHONE (913) 296-2215
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August 23, 1990

ATTORNEY GENERAL OPINION NO. 90-100

The Honorable Michael R. O'Neal
State Representative, One Hundred Fourth District
P.O. Box 2977
Hutchinson, Kansas 67504

The Honorable Arthur Douville
State Representative, Twentieth District
9600 Woodson
Overland Park, Kansas 66207-2844

The Honorable Eugene P. Amos
State Representative, Eighteenth District
5925 Bluejacket
Shawnee, Kansas 66203

The Honorable Nancy J. Brown
State Representative, Twenty-Seventh District
15429 Overbrook Lane
Stanely, Kansas 66224

Re: Taxation – Motor Vehicles – Taxes Levied Annually for Registration Period; Due Date

Synopsis: The current practice under K.S.A. 79-5101 *et seq.* and K.A.R. 92-51-21 of taxing motor vehicles in such a way as to cause taxpayers with surnames at the end of the alphabet to pay more in taxes than identically situated taxpayers with surnames at the beginning of the alphabet is violative of the equal protection clause of the United States Constitution. Cited herein: K.S.A. 1989 Supp. 8-134; K.S.A. 79-5103; 79-5104; 79-5105; 79-5107, as amended by L. 1990, ch. 34, § 5; K.A.R. 92-51-21; U.S. Const., Amend. XIV.

* * *

Dear Representatives O'Neal, Douville, Amos and Brown:

You have each requested our opinion regarding the constitutionality of K.S.A. 79-5101 *et seq.*, the motor vehicle tax act. Specifically you question whether the staggered registration and taxation system violates the equal protection clause of the fourteenth amendment to the United States Constitution.

K.S.A. 79-5103(a) requires the department of revenue to annually adopt a schedule for determining the value of motor vehicles as of the time they are first offered for sale as new motor vehicles. The schedule is to be formulated using the trade-in value for each particular make and model as developed from nationally recognized publications. Based on the value so determined, each motor vehicle is to be classified in accordance with K.S.A. 79-5104. Then, pursuant to K.S.A. 79-5105, the tax on each motor vehicle is to be computed as follows:

> "[B]y (a) determining the amount representing the midpoint of the values included within the

> class in which such motor vehicle is classified under K.S.A. 79-5102 or 79-5103, and amendments thereto, except that the midpoint of class 20 shall be $21,000 plus $2,000 for each $2,000 or portion thereof by which the trade-in value of the vehicle exceeds $22,000, and, if the model year of the motor vehicle is a year other than the year for which the tax is levied, by reducing such midpoint amount by an amount equal to 16% of: (1) The remaining balance for each year of difference between the model year of the motor vehicle and the year for which the tax is levied if the model year of the motor vehicle is 1981 or a later year or (2) the remaining balance for each year of difference between the year 1980 and the year for which the tax is levied if the model year of the motor vehicle is 1980 or any year prior thereto;
>
> "(b) multiply the amount determined under (a) by 30% which shall constitute the taxable value of the motor vehicle); and
>
> "(c) multiply the taxable value of the motor vehicle produced under (b) above by the county average tax rate for the next preceding tax year."

The tax is then levied annually for the individual taxpayer's registration period as set forth in K.S.A. 8-134(c) and K.A.R. 92-51-21. In other words, the tax year for any particular taxpayer is that taxpayer's registration period. *See* K.S.A. 79-5107, as amended by L. 1990, ch. 34, § 5. Pursuant to K.A.R. 92-51-21, the registration periods are staggered according to the first letter of the vehicle owner's surname. Taxpayers with surnames beginning with A register for the period beginning with the last day

of February through the last day of the following February. Taxpayers with surnames beginning with Z register for the period beginning with the last day of December through the following December.

An example of how this scheme works was provided by the legislative research department via Representative O'Neal.

> "In our example, we will assume that two taxpayers with surnames. beginning with 'A' and 'T', respectively, purchased identical motor vehicles valued at $15,000 each with a model year of 1989 in June, 1989 and registered those vehicles on July 1, 1989. Further assume for the sake of simplicity that neither taxpayer previously had a vehicle, so no credit for prior taxes paid is due.
>
> "The countywide average mill levy would be applied to 30 percent of the trade-in value when new, or $4,500 for both vehicles. Assuming that the countywide average mill levy is 120, the annual liability on each vehicle would be $540. Since the expiration date for A's registration is the end of February, he would owe 8 months' liability, or $360. When A renews in February of the new year, the tax would be based on the midpoint of the value class, depreciated 16 percent; thus, the taxable value of the vehicle would be $12,600. Assuming the countywide average mill levy did not change, the 120 mills then would be applied to $3,780 ($12,600 x 30 percent), and he would owe $453.60 to register the vehicle for the new full year.
>
> "Taxpayer T, on the other hand, would owe 5 months' liability on the initial registration, since

> his registration normally expires at the end of November. So to register his vehicle from July 1 through November 31 T would incur a liability of $225 (5/12ths of $540). At time for T's renewal, however, the 16 percent depreciation would not have started, since the model year is the same as the registration year. T would therefore owe the full $540 to renew his registration for the new full year, and would pay a total of $765 in calendar year 1989.
>
> "Extending this analysis for another year, the renewal cost for both A and T would be $453.60 in 1990, and $381.02 in 1991.
>
> "Continuing the constant mill levy assumption and annual depreciation, the enclosed Table 1 [attached] shows that if both A and T disposed of the vehicles on December 31, 1994, collecting their respective amounts of refunds due, T would have paid $236 more in motor vehicle taxes after owning the vehicles for five and one-half years.
>
> "If one assumes that the vehicles had a 1990 model year, an identical analysis reveals a difference of $203 more in taxes paid by T (see Table 2) [attached]."

Clearly taxpayer T has been treated differently than taxpayer A. However, "the equal protection clause does not forbid discrimination with respect to things [or people] that are different." 16A Am.Jur.2d *Constitutional Law* § 738 (1979).

> "The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals differently from the others. . . . Where taxation is concerned and no

> specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classification and drawing lines which in their judgment produce reasonable systems of taxation." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359, 35 L.Ed.2d 351, 354, 355, 93 S.Ct. 1001 (1973) (footnotes omitted).
>
> "But there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification *'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.'* " *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 527, 3 L.Ed.2d 480, 485, 79 S.Ct. 437 (1959) (emphasis added; citations omitted).

See also State ex rel. Tomasic v. Kansas City, Kansas Port Authority, 230 Kan. 404, 425 (1981) ("The state taxation scheme must have a rational basis with classifications based on differences having a fair and substantial relation to the object of the legislation"); *Henry v. Bauder*, 213 Kan. 751, 753 (1974) ("There must be some difference in character, condition, or situation, to justify distinction, and this difference must bear a just and proper relation to the proposed classification and regulation; otherwise the classification is forced and unreal, and greater burdens are, in fact, imposed on some than on others of the same desert"); 16A Am.Jur.2d *Constitutional Law* §§ 752, 754, 755 (1979).

The classification in question is based on the first letter of a taxpayer's surname. The reported objectives

for the legislation corresponding payment of motor vehicle taxes to vehicle registration were to ease administration and reduce delinquencies. Reports of Special Committees to the 1975 Kansas Legislature, Proposal No. 88 (1974). Presumably the purpose for staggering registration alphabetically was to ease administration as well. Staggering dates when taxes are due based on surnames, by itself, is of little or no constitutional consequence. However, while not facially invalid, the effect of doing so renders the classification unconstitutional. We find absolutely no difference between taxpayers with surnames beginning with A and those beginning with T which have a fair and substantial relation to the objects of the legislation. There is no difference in character, condition or situation to justify distinction between the two groups. Thus we do not believe the discriminatory treatment can be supported. Certainly there is no reason for taxing persons with surnames at the end of the alphabet at a higher rate than persons with surnames at the beginning of the alphabet. *State ex rel. Stephan v. Smith*, 242 Kan. 336, 373 (1987) ("Assisting the indigent is a legitimate public goal, but cannot be accomplished at the expense of a particular group of people"). This is particularly so when the stated objectives of the legislation can be met without imposing this discriminatory treatment. 16A Am.Jur.2d *Constitutional Law* § 756 (1979). A bill was introduced in the 1990 legislative session to correct the inequity (1990 House Bill No. 2852), but was rejected due to a fiscal note estimating a $21-23 million annual reduction in revenues to local units of government. We believe there are other methods to minimize the inequity, some of which may not significantly reduce revenues. In any event, we do not

believe potential loss of revenue is sufficient to sustain the current inequity. It is therefore our opinion that the current scheme for taxing motor vehicles violates the equal protection clause of the fourteenth amendment.

For similar reasons we believe the scheme also violates section 1 of the Bill of Rights of the Kansas Constitution. *Henry v. Bauder*, 213 Kan. at 752, 753; *State ex rel. v. Tomasic v. Kansas City, Kansas Port Authority*, 230 Kan. at 426. *See also Farley V. Engelken*, 241 Kan. 663, 671 (1987) ("the Kansas Constitution affords separate, adequate, and greater rights than the Federal Constitution").

In conclusion, the current practice under K.S.A. 79-5101 *et seq.* and K.A.R. 92-51-21 of taxing motor vehicles in such a way as to cause taxpayers with surnames at the end of the alphabet to pay more in taxes than identically situated taxpayers with surnames at the beginning of the alphabet is violative of the equal protection clause of the United States Constitution.

Very truly yours,

/s/ Robert T. Stephan
ROBERT T. STEPHAN
Attorney General of Kansas

/s/ Julene L. Miller
Julene L. Miller
Deputy Attorney General

RTS:JLM:jm

APPENDIX G

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS CIVIL DEPARTMENT

JERRY S. DEAN and DANA D. DEAN, et al., Plaintiffs, vs. STATE OF KANSAS, et al., Defendants.	Case No. 90-C-14,011 [Consolidated in Division 10]
JAMES P. UNDERWOOD and ROMA UNDERWOOD, et al., Plaintiffs, vs. STATE OF KANSAS, et al., Defendants.	Case No. 91-C-33

AFFIDAVIT OF DONALD R. PAXSON

I, Donald R. Paxson, of lawful age and first being duly sworn under oath, hereby depose and state as follows:

1. This Affidavit is made based upon my personal knowledge and experience, and I am competent to testify regarding the matters set forth herein.

2. I am a Certified Public Accountant ["CPA"] in private practice with the accounting firm of Wendling

Noe Nelson & Johnson, 1500 Bank IV Tower, Topeka, Kansas. I have been a CPA in the State of Kansas for more than thirty (30) years, during which time I have acquired extensive experience in providing tax, accounting and auditing services for a wide variety of clients. I also hold the degree of Juris Doctor ["J.D."] from the University of Kansas School of Law, Lawrence, Kansas, and I have previously qualified as an expert witness in matters relating to taxation.

3. I am generally familiar with the plaintiffs' allegations in this litigation and, as an automobile owner for many years, I am personally acquainted with the staggered registration and tax system in Kansas for motor vehicles. From an examination of the motor vehicle registration and tax statements for my own automobiles, I am also aware that such statements do not identify nor disclose the tax rate employed in calculating motor vehicle taxes due.

4. Based upon my knowledge of and experience with tax clients for more than thirty (30) years, it is my opinion that average motor vehicle taxpayers would have no reason to know or suspect that any particular motor vehicle tax levy is improper or invalid absent information on registration and tax statements regarding the tax rate used in calculating motor vehicle taxes due. Furthermore, while it is possible to mathematically derive the motor vehicle tax levy rate from information contained on motor vehicle registration and tax statements, in my experience, this would require a calculation that most taxpayers would not perform.

AFFIANT FURTHER SAITH NOT.

/s/ Donald R. Paxson
Donald R. Paxson, C.P.A., J.D.

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

Subscribed and sworn to before me, a Notary Public in and for the State of Kansas, on this 4th day of March, 1991.

NOTARY PUBLIC – State of Kansas
Michelle K. Bleeck
By Appt. Exp. 4-10-94

/s/ Michelle K. Bleeck
Notary Public

My Commission Expires on:

4-10-94

APPENDIX H

(SEAL)

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER,
TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE (913) 296-2215
CONSUMER PROTECTION 296-3751
TELECOPIER 296-6296

October 12, 1990

ATTORNEY GENERAL OPINION NO. 90-115

Mr. Ed C. Rolfs, Secretary
Kansas Department of Revenue
Docking State Office Building
915 S.W. Harrison St.
Topeka, Kansas 66612-1588

Re: Taxation – Motor Vehicles – Computation of Tax; Mill Levy Rates

Synopsis: The secretary of revenue has no authority to accelerate the implementation of the mill levy rates used in the formula for determining motor vehicle taxes. Cited herein: K.S.A 1989 Supp. 8-134; K.S.A. 79-5102; 79-5103; 79-5105; 79-5106; 79-5107, as amended by L. 1990, ch. 34, § 5; 79-5115; K.A.R. 92-51-21; 92-55-2a.

* * *

Dear Secretary Rolfs:

You request our opinion regarding your authority to alter the implementation date of a new mill levy under K.S.A. 79-5105 absent statutory amendment. As we understand

it, certain county representatives are asking that you prorate the mill levy rates of the two years next preceding the two calendar years over which a registration spans, much like you prorated the depreciation pursuant to K.A.R. 92-55-2a.

We note initially the rules attendant to promulgation of rules and regulations by administrative agencies such as the department of revenue:

> "Administrative agencies are creatures of statute and their power is dependent upon authorizing statutes, therefore any exercise of authority claimed by the agency must come from within the statute. There is no general or common law power that can be exercised by an administrative agency.
>
> "Rules or regulations of an administrative agency, to be valid, must be within the statutory authority conferred upon the agency. Those rules or regulations that go beyond the authority authorized, which violate the statute, or are inconsistent with the statutory power of the agency have been found void. Administrative rules and regulations to be valid must be appropriate, reasonable and not inconsistent with the law." *Pork Motel, Corp. v. Kansas Dept. of Health and Environment,* 234 Kan. 374, 378-379 (1983).

K.S.A. 79-5115 directs the secretary of revenue "to adopt such rules and regulations as are necessary to administer and carry out the provisions of [the motor vehicle tax] act." Recently, the Kansas court of appeals reviewed similar language in the insurance statutes being proffered as authority for an insurance commission regulation. The court determined that "the statute expressly provides,

however, only the power to make regulations necessary to enforce the laws relating to supervision of insurance, *i.e.*, some other statute must first provide more specific basis for authority before this statute comes into play." *Durrett v. United Services Automobile Association*, ___ Kan.App.2d ___, case no 64,604 (Sept. 28, 1990). Thus, we must look to the statute which would arguably be administered or carried out by the proposed regulation to determine the agency's authority to adopt it.

K.S.A. 79-5105 is the statute which sets forth the formula for determining the motor vehicle tax. This is the only statute which refers to the mill levy to be used in figuring the tax. K.S.A. 79-5105 provides in part:

> "The amount of such tax on a motor vehicle shall be computed by. . . .
>
> "(c) multiply[ing] the taxable value of the motor vehicle produced under (b) above by the county average tax rate (mill levy) *for the next preceding tax year.*"
>
> (Emphasis added).

Motor vehicle taxes are calculated and imposed at the time of registration. K.S.A. 79-5106; 79-5107, as amended by L. 1990, ch. 34 § 5. The "tax year" for purposes of motor vehicle taxation is the individual's registration year. K.S.A. 79-5106; 79-5107, as amended. The registration year of an individual is determined pursuant to K.S.A. 1989 Supp. 8-134 and K.A.R. 92-51-21. All registration years span a part of two calendar years. However, the term "tax year" as used in K.S.A. 79-5105(c) refers to the tax year for assessment of real and personal property taxes under K.S.A. 79-101 *et seq.*, which is the calendar

year. Thus, while a taxpayer pays for a registration year which spans a part of two calendar years, the mill levy figure required by statute is from one specific calendar year; the year next preceding the date of registration. We do not believe it would be reasonable, and indeed would be in conflict with K.S.A. 79-5105, for the department of revenue to interpret this provision otherwise, *i.e.* to use two different calendar years' mill levy rates, and thus it is our opinion that the secretary has no authority to implement the requested change. (We note that the authority for promulgation of K.A.R. 92-55-2a differs in two significant respects: (1) the secretary has specific authority to determine the value of motor vehicles for purposes of the act, K.S.A. 79-5102, 79-5103, and depreciating the vehicle goes to its value; (2) K.S.A. 79-5105(a) specifically allows adjustment for depreciation when the model year of the motor vehicle is a year other than that for which the vehicle is being taxed. As noted above, the vehicle is taxed for parts of two different years, so depreciation can and should be prorated pursuant to this statute.)

In conclusion, the secretary of revenue has no authority to accelerate the implementation of the mill levy rates used in the formula for determining motor vehicle taxes.

Very truly yours,

/s/ Robert T. Stephan
ROBERT T. STEPHAN
Attorney General of Kansas

/s/ Julene L. Miller
Julene L. Miller
Deputy Attorney General

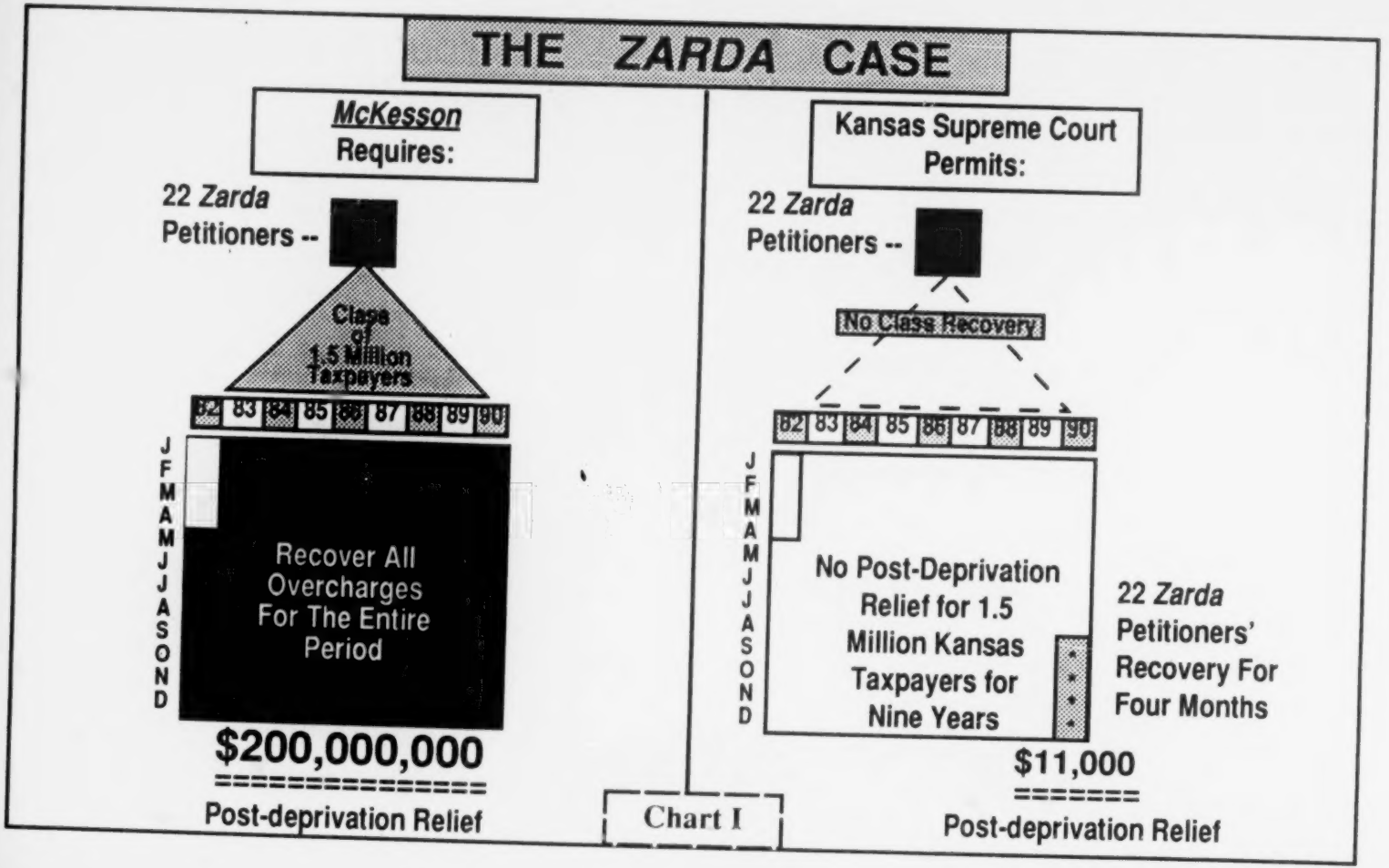
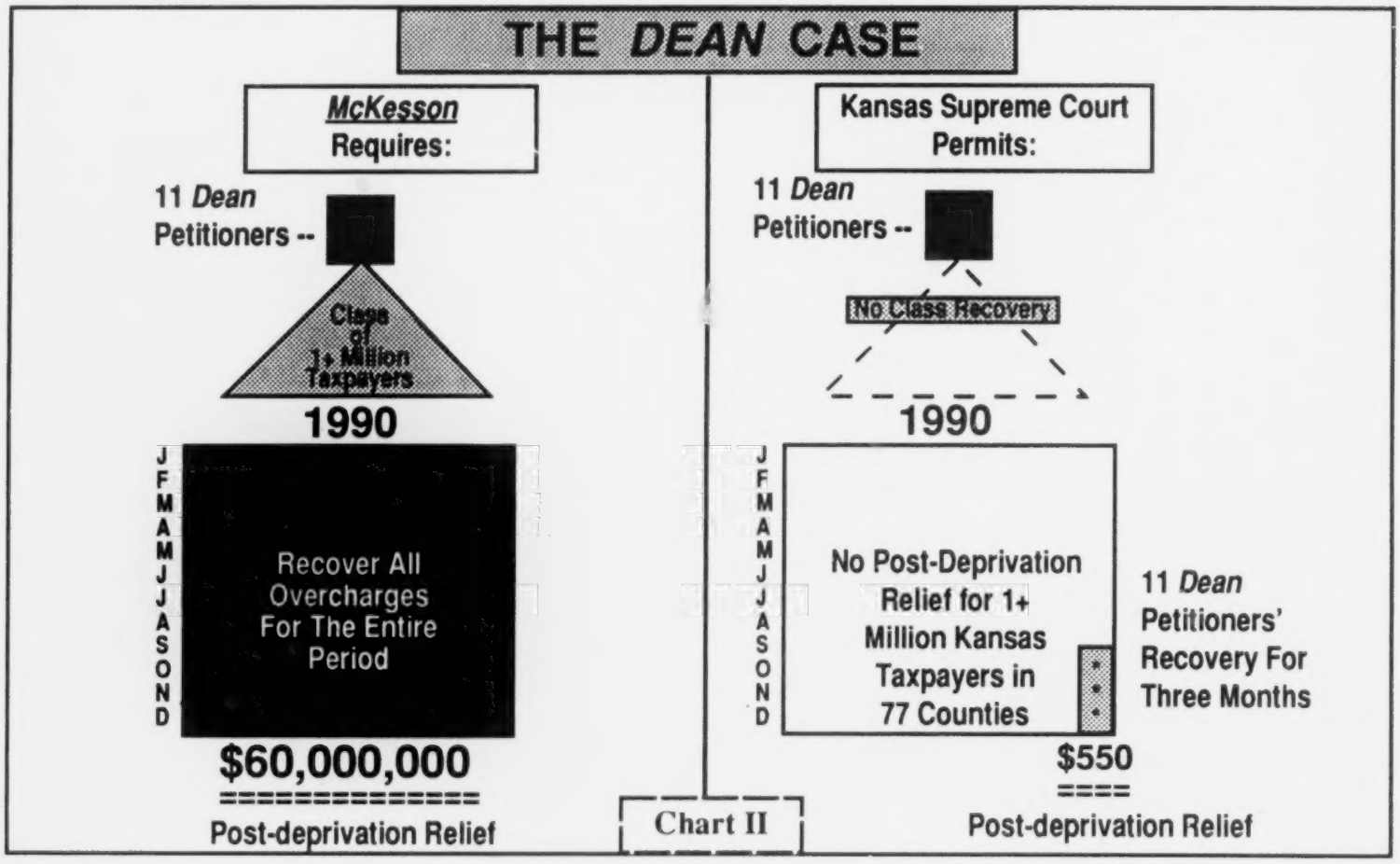

THE ZARDA CASE
McKesson Requires:
22 Zarda Petitioners --
Class of 1.5 Million Taxpayers
82 83 84 85 86 87 88 89 90
J F M A M J J A S O N D
Recover All Overcharges For The Entire Period
$200,000,000
Post-deprivation Relief
Kansas Supreme Court Permits:
22 Zarda Petitioners --
No Class Recovery
82 83 84 85 86 87 88 89 90
J F M A M J J A S O N D
No Post-Deprivation Relief for 1.5 Million Kansas Taxpayers for Nine Years
22 Zarda Petitioners' Recovery For Four Months
$11,000
Post-deprivation Relief

Chart I


THE DEAN CASE
McKesson
Requires:
11 Dean
Petitioners --
Class
of
1+ Million
Taxpayers
1990
J F M A M J J A S O N D
Recover All
Overcharges
For The Entire
Period
$60,000,000
==========
Post-deprivation Relief
Kansas Supreme Court
Permits:
11 Dean
Petitioners --
No Class Recovery
1990
J F M A M J J A S O N D
No Post-Deprivation
Relief for 1+
Million Kansas
Taxpayers in
77 Counties
11 Dean
Petitioners'
Recovery For
Three Months
$550
====
Post-deprivation Relief
Chart II

Supreme Court, U.S.
FILED
MAY 13 1992
OFFICE OF THE CLERK

(2)

No. 91-1675

In The

Supreme Court of the United States

October Term, 1991

BERNARD A. ZARDA, SR., et al.,

Petitioners,

vs.

STATE OF KANSAS, et al.,

Respondents,

and

JERRY S. DEAN, et al.,

Petitioners,

vs.

STATE OF KANSAS, et al.,

Respondents,

On Petition for Writ of Certiorari
to the Supreme Court of the State of Kansas

RESPONDENTS' BRIEF IN OPPOSITION

MARK A. BURGHART
WILLIAM E. WATERS *
Kansas Department of Revenue
Docking State Office Building
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(913) 296-4035
* *Counsel of Record*

QUESTION PRESENTED

Whether a State may require taxpayers to exhaust administrative remedies prior to filing a 42 U.S.C. § 1983 action in state court to obtain refunds of personal property taxes.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 3

I. The decisions below are consistent with this Court's holding and rationale in *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18 (1990) 3

II. The decisions below are consistent with this Court's holding and rationale in *Fair Assessment in Real Estate Assn. v. McNary*, 454 U.S. 100 (1981) 7, 8

III. There is no basis for this Court to review alleged conflicts between *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989) and *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18 (1990) 9

IV. Petitioners have not shown that a class action procedure is constitutionally required in state tax cases 10

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Page

Agron v. Illinois Bell Telephone Company, 325 F. Supp. 487 (N.D. Ill. 1970), *reversed on other grounds* 449 F.2d 906 (7th Cir. 1071), *cert. denied* 405 U.S. 954 (1972) 11

Aronson v. Commonwealth, 401 Mass. 244, 516 N.E.2d 137 (1987) 12

Bischoff v. City of Newport, 733 S.W. 2nd, 762 (Ky. App. 1987) 11

Bland v. McHann, 463 F.2d 21 (5th Cir. 1972), *cert. denied* 410 U.S. 966 (1973) 10

Board of County Commissioners v. Schmidt, 12 Kan. App. 2d 812, 758 P.2d 254 (1988) 13

California v. Grace Brethren Church, 457 U.S. 393 (1982) 7

Charles v. Spradling, 524 S.W.2d 820 (Mo. 1975) 11

Cities Serv. Oil Co. v. Board of County Comm'rs, 224 Kan. 183, 578 P.2d 718 (1978) 5, 6

Coleman v. McLaren, 631 F. Supp. 749 (N.D. Ill. 1985), *aff'd* 796 F.2d 477 (7th Cir. 1986) 10

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County Tax Levy By Box Butte County, 220 Neb. 897, 374 N.W.2d 235 (1985) 11

Fair Assessmesnt in Real Estate Assn. v. McNary, 454 U.S. 100 (1981) 8

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TABLE OF AUTHORITIES—Continued

Felton Truck Line v. State Board of Tax Appeals,
183 Kan. 287, 327 P.2d 836 (1958) 13

Hanson v. County of Lincoln,
188 Neb. 461, 197 N.W.2d 651 (1972), *supplemental opinion* 188 Neb. 798, 197 N.W.2d 655 (1972) ... 11

Hoffman v. Colo. State Bd. of Assessment,
683 P.2d 783 (Colo. 1984) 12

Hogan v. Musolf,
157 Wis. 2d 362, 459 N.W.2d 865 (1990), *reversed* 163 Wis. 2d 1, 471 N.W.2d 216 (1990), *cert. denied* ____ U.S. ____, 116 L. Ed. 2d 773, 112 S. Ct. 867 (1992) 8, 9

Hooks v. Comptroller of Treasury,
265 Md. 380, 289 A.2d 332 (1972) 11

In re Tax Appeal of R & R Janitor Service,
9 Kan. App. 2d, 683 P.2d 909 (1984), *rev. denied* 236 Kan. 876 (1984) 3

Johnson v. Gaston County,
71 N.C. App. 707, 323 S.E.2d 381 (1984), *rev. denied* 313 N.C. 508 (1985) 9

Kansas Sunset Assocs. v. Kansas Dept. of Health & Environment, 16 Kan. App. 2d 1, 818 P.2d 797 (1991) 7

Linderkamp v. Bismarck School Dist. No. 1,
397 N.W.2d 76 (N.D. 1986) 8, 9

Manel v. Hutchinson,
494 F.2d 364 (9th Cir. 1974) 10

McKesson Corp. v. Florida Alcohol & Tobacco Div.,
496 U.S. 18 (1990) 3, 4, 7, 9

Melof v. Hunt,
718 F. Supp. 877 (M.D. Ala. 1989) 10

Miller v. Bauer,
517 F.2d 27 (7th Cir. 1975) 10

TABLE OF AUTHORITIES—Continued

Nutbrown v. Munn,
311 Or. 328, 811 P.2d 131 (1991), *cert. denied* ____ U.S. ____, 116 L. Ed. 2d 773, 112 S. Ct. 867 (1992) 8

Owner-Operators Independent Drivers Ass'n. of America v. State, 209 Conn. 679, 553 A.2d 1104 (1989) ... 8

Patsy v. Board of Regents,
457 U.S. 496 (1982) 8, 9

Raschke v. Blacher,
141 Ill. App. 3d 813, 491 N.E.2d 1171 (1986) 8

Rosewell v. LaSalle National Bank,
450 U.S. 503 (1981) 7

Schoderbek v. Carlson,
113 Cal. App. 3d, 170 Cal. Rptr. 400 (1980) 12

Spencer v. South Carolina Tax Com'n,
281 S.C. 492, 316 S.E.2d 386 (1984) 9

State ex rel. Smith v. Miller,
239 Kan. 187, 718 P.2d 1298 (1986) 6, 13

Stufflebaum v. Panethiere,
691 S.W.2d 271 (Mo.banc 1985) 9

Tri-County Public Airport Authority v. Board of Morris County Commissioners, 233 Kan. 960, 666 P.2d 698 (1983) 13

Waldron v. Collins,
788 F.2d 736 (11th Cir. 1986), *cert. denied* 479 U.S. 884 (1976) 10

Will v. Michigan Dept. of State Police,
491 U.S. 58 (1989) 9, 10

Wirt v. Esrey,
233 Kan. 300, 662 P.2d 1238 (1983) 6

Wulfkuhle v. Kansas Department of Revenue,
234 Kan. 241, 671 P.2d 547 (1983) 2, 3

Zizka v. Water Pollution Control Authority,
195 Conn. 682, 490 A.2d 509 (1985) 9

TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS

42 U.S.C. § 1983 ..... 8, 9, 10

Kan. Adm. Reg. 94-2-8 6

Kan. Adm. Reg. 94-2-9 6

Kan. Adm. Reg. 94-2-10 ..... 6, 10

Kan. Sess. Laws (1984) 5

Kan. Stat. Ann. § 60-223 10

Kan. Stat. Ann. § 74-2426 ..... 6, 7

Kan. Stat. Ann. § 77-601 ..... 2, 6

Kan. Stat. Ann. § 77-607 2

Kan. Stat. Ann. § 77-609 6

Kan. Stat. Ann. § 77-617 6

Kan. Stat. Ann. § 77-622 ..... 6, 7

Kan. Stat. Ann. § 77-627 ..... 2, 6

Kan. Stat. Ann. § 79-2005 ..... 2, 4, 5, 7

Kan. Stat. Ann. § 79-5106 2

OTHER AUTHORITIES

59 Am. Jur. 2d, *Parties,* § 51, p. 454 ..... 10, 11

3B Moore's Federal Practice, ¶ 23.02[2.-23] 11

Ryan, *The New Kansas Administrative Procedure and Judicial Review Acts,* Journal of the Kansas Bar Association, Spring, 1985 5

No. 91-1675

In The

Supreme Court of the United States

October Term, 1991

BERNARD A. ZARDA, SR., et al.,

Petitioners,

vs.

STATE OF KANSAS, et al.,

Respondents,

and

JERRY S. DEAN, et al.,

Petitioners,

vs.

STATE OF KANSAS, et al.,

Respondents.

On Petition for Writ of Certiorari
to the Supreme Court of the State of Kansas

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the opinions of the Kansas Supreme Court entered on February 28, 1992.

STATEMENT OF THE CASE

The basic facts in these cases are stated in the opinions below and in the petition. Petitioners, however, misstate several pertinent facts.

First, petitioners state that they were denied access to the Kansas judicial system in their efforts to secure post-deprivation tax relief in the form of property tax refunds. Pet. 3, 8. This is incorrect. In both *Zarda v. State of Kansas,* 250 Kan. 364, ____ P.2d ____ (1992) and *Dean v. State of Kansas,* 250 Kan. 417, ____ P.2d ____ (1992), the Kansas Supreme Court made it clear that plaintiffs had deprived themselves of access to the Kansas judicial system by failing to follow administrative procedures. *Zarda,* 250 Kan. at 367; *Dean,* 250 Kan. at 420. In Kansas, administrative determinations are judicially reviewable under the Act for Judicial Review and Civil Enforcement of Agency Actions (Kan. Stat. Ann. § 77-601 to Kan. Stat. Ann. § 77-627, inclusive); however, pursuant to Kan. Stat. Ann. § 77-607, subsection (a), subpart (2) a person qualifies for judicial review of agency action only after exhausting administrative remedies.

Second, petitioners state that pursuant to Kan. Stat. Ann. § 79-2005 (1991 Supp.) a tax protest must be filed when a motor vehicle is registered for a particular year. Pet. 4. This too is incorrect. Motor vehicle taxes in Kansas must be paid at the time of registration. Kan. Stat. Ann. § 79-5106. However, Kan. Stat. Ann. § 79-2005 (1991 Supp.) clearly provides that a tax protest may be filed either at the time of paying taxes or no later than December 20. See Kan. Stat. Ann. § 79-2005, subsection (a) (1991 Supp.).

Petitioners suggest that opinions issued by the State Attorney General have the force and effect of law. Pet. 3, 5, 9, 13 and 18. However, an attorney general opinion is neither conclusive nor binding. *Wulfkuhle v. Kansas Depart-*

ment of Revenue, 234 Kan. 241, 248, 671 P.2d 547, 553 (1983). Moreover, an attorney general opinion interpreting a statute is entitled to less weight than an administrative interpretation of a statute. *In re Tax Appeal of R & R Janitor Service*, 9 Kan. App. 2d 500, 503, 683 P.2d 909, 912 (1984) *rev. denied* 236 Kan. 876 (1984).

REASONS FOR DENYING THE WRIT

I. THE DECISIONS BELOW ARE CONSISTENT WITH THIS COURT'S HOLDING AND RATIONALE IN *McKESSON CORP. v. FLORIDA ALCOHOL & TOBACCO DIV.*, 496 U.S. 18 (1990).

In *McKesson* this Court stated:

> Because exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause. 496 U.S. at 36.
>
> . . . .
>
> [I]t is well established that a State need not provide predeprivation process for the exaction of taxes. Allowing taxpayers to litigate their tax liabilities prior to payment might threaten a government's financial security, both by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult. *Id.* at 37.
>
> . . . .
>
> *The State might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest* or providing some other timely notice of complaint; execute any refunds on a reasonable installment basis; enforce rel-

> atively short statutes of limitation applicable to such actions, refrain from collecting taxes pursuant to a scheme that has been declared invalid by a court or other competent tribunal pending further review of such declaration on appeal; and/or place challenged tax payments into an escrow account or employ other accounting devices such that the State can predict with greater accuracy the availability of undisputed treasury funds. (Emphasis added.) *Id.* at 45.

In Kansas, the administrative procedure for the recovery of protested taxes is prescribed by Kan. Stat. Ann. § 79-2005 (1991 Supp.). Pursuant to Kan. Stat. Ann. § 79-2005 (1991 Supp.) valuation disputes (the complaint in *Zarda*) and mill levy disputes (the complaint in *Dean*) may be resolved in the administrative process.[1]

Kan. Stat. Ann. § 79-2005 (1991 Supp.) prescribes the following procedures:

1. The taxpayer may file a "written statement" of protest with the county treasurer either at the time of paying such taxpayer's taxes or no later than December 20. Kan. Stat. Ann. § 79-2005, subsection (a) (1991 Supp.).

2. The county appraiser is required to schedule a "formal meeting" with the taxpayer within 15 days of the receipt of the "written statement" of protest. Kan. Stat. Ann. § 79-2005, subsection (a) (1991 Supp.).

3. The county appraiser is required to notify the taxpayer and state board of tax appeals of the results of the

---

[1] Kan. Stat. Ann. § 79-2005, subsection (b) (1991 Supp.) pertains to "valuation" disputes; Kan. Stat. Ann. § 79-2005, subsection (c) (1991 Supp.) pertains to "mill levy" disputes.

"formal meeting" within 15 business days. Kan. Stat. Ann. § 79-2005, subsection (a) (1991 Supp.).

4. The taxpayer may appeal the results of the "formal meeting" to the board of county commissioners or, at the taxpayer's option, appeal directly to the state board of tax appeals. Kan. Stat. Ann. § 79-2005, subsection (e) (1991 Supp.).

5. The taxpayer may appeal the decision of the board of county commissioners to the state board of tax appeals. Kan. Stat. Ann. § 79-2005, subsection (f) (1991 Supp.).

6. The state board of tax appeals is required to set a hearing on the taxpayer's appeal within 90 days after the filing of the same. Kan. Stat. Ann. § 79-2005, subsection (h) (1991 Supp.).

7. The hearing before the state board of tax appeals is conducted in accordance with the Kansas Administrative Procedure Act. K.S.A. § 79-2005, subsection (g) (1991 Supp.).[2]

8. The state board of tax appeals may order protested taxes refunded. K.S.A. § 79-2005, subsections (i) and (k) (1991 Supp.). *Cities Serv. Oil Co. v. Board of County Comm'rs*, 224 Kan. 183, 187-188, 578 P.2d 718, 721-722 (1978) (determination of the method to be utilized in the refund of taxes paid under protest is a proper administrative function of the Board to be carried out according to its orders).

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[2] The Kansas Administrative Procedure Act was approved in 1984 effective July 1, 1985 (Kan. Sess. Laws, 1984, Chapter 313, §§ 1-41). The Kansas Administrative Procedure Act is modeled after the Uniform Law Commissioners' Model State Administrative Procedure Act (1981) approved by the National Conference of Commissioners on Uniform State Laws, August 7, 1981. Ryan, *The New Kansas Administrative Procedure and Judicial Review Acts*, Journal of the Kansas Bar Association, Spring, 1985, at 54 n.1.

The state board of tax appeals is the highest administrative taxing authority in Kansas. *Wirt v. Esrey,* 233 Kan. 300, 314, 662 P.2d 1238, 1249 (1983); *Cities Serv. Oil Co.,* 224 Kan. at 187-188, 578 P.2d at 722. Any party may appear at any hearing or other proceeding before the state board of tax appeals and be heard in person or be represented by an attorney who is regularly admitted to practice before the Kansas Supreme Court. Kan. Adm. Reg. 94-2-10. The Kansas rules of civil procedure and evidence are applicable to procedures before the state board of tax appeals.[3] Discovery is permitted. Kan. Adm. Reg. 94-2-8. Subpoenas may be requested. Kan. Adm. Reg. 94-2-9. All proceedings are recorded by a court reporter, unless waived by the parties. Kan. Adm. Reg. 94-2-10. All proceedings before the state board of tax appeals are subject to judicial review. Kan. Stat. Ann. § 74-2426 (1991 Supp.).

Kan. Stat. Ann. § 74-2426 (1991 Supp.) provides that any action of the state board of tax appeals is subject to review in accordance with the Act for Judicial Review and Civil Enforcement of Agency Action (Kan. Stat. Ann. § 77-601 to Kan. Stat. Ann. § 77-627, inclusive). Judicial review is conducted by the district court except when a statute specifically provides for review of an agency action by appeal directly to the court of appeals or as otherwise provided by law. Kan. Stat. Ann. § 77-609, subsection (a).

The constitutionality of a statute may be presented as a new issue in the district court on judicial review. Kan. Stat. Ann. § 77-617; *State ex rel. Smith v. Miller,* 239 Kan. 187, 190, 718 P.2d 1298, 1301 (1986). Upon judicial review the court may grant other appropriate relief, whether mandatory, injunctive or declaratory; preliminary or final; temporary or permanent; equitable or legal. Kan. Stat. Ann.

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[3] Kan. Adm. Reg. 94-2-10.

§ 77-622, subsection (b); *Kansas Sunset Assocs. v. Kansas Dept. of Health & Environment,* 16 Kan. App. 2d 1, 3, 818 P.2d 797, 799 (1991).

This Court has held that administrative remedies are required to meet certain minimum *procedural* criteria. *Rosewell v. LaSalle National Bank,* 450 U.S. 503, 512, 522 (1981). Specifically, an administrative tax remedy is procedurally adequate if it provides the taxpayer with a full hearing and judicial determination of all constitutional objections to the tax. *California v. Grace Brethren Church,* 457 U.S. 393, 411 (1982). Clearly, as found by the Kansas Supreme Court, Kan. Stat. Ann. § 79-2005 (1991 Supp.) and Kan. Stat. Ann. § 74-2426 (1991 Supp.) meet and exceed these minimum *procedural* criteria.

In both *Zarda* and *Dean* taxpayers were not deprived of post-deprivation tax relief. Consistent with this Court's holding in *McKesson,* the Kansas Supreme Court found that the plaintiffs had not paid their taxes under protest as required by Kan. Stat. Ann. § 79-2005 (1991 Supp.) and, therefore, were not entitled to a refund of taxes already paid.[4] *Zarda,* 250 Kan. at 374; *Dean,* 250 Kan. at 427. The Kansas Supreme Court specifically found that the plaintiffs could have sought a declaratory judgment as to the constitutionality of the administrative regulation and injunctive relief without exhausting administrative remedies. *Zarda,* 250 Kan. at 371; *Dean,* 250 Kan. at 427.

II. THE DECISIONS BELOW ARE CONSISTENT WITH THIS COURT'S HOLDING AND RATIONALE IN

[4] The attorney general's opinion (90 Att'y Gen. 115) (Pet. Appendix H) spawned numerous tax protests pursuant to Kan. Stat. Ann. § 79-2005 (1991 Supp.) If the attorney general's opinion is sustained, these litigants having exhausted administrative remedies will receive motor vehicle tax refunds pursuant to Kan. Stat. Ann. § 79-2005, subsections (i) and (k) (1991 Supp.).

***FAIR ASSESSMENT IN REAL ESTATE ASSN. v. McNARY*, 454 U.S. 100 (1981).**

Petitioners argue that "confusion" exists among the states as to when administrative remedies must be exhausted prior to filing a 42 U.S.C. § 1983 action in state court. Pet. 26.

This Court in *Fair Assessment in Real Estate Assn. v. McNary*, 454 U.S. 100 (1981), created an exception to the general rule that exhaustion of administrative remedies is not a precondition to bringing suit under 42 U.S.C. § 1983.[5] In *McNary* this Court stated: "[T]axpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete, and may ultimately seek review of the state decisions in this Court." *Id.* at 116. Justice Brennan, joined by Justices Marshall, Stevens, and O'Connor, concurred based upon the failure of petitioners to exhaust administrative remedies in each tax year for which they sought damages.

State courts have uniformly applied *McNary* and dismissed 42 U.S.C. § 1983 actions challenging state taxation schemes for failure to exhaust administrative remedies. See *Hogan v. Musolf*, 163 Wis. 1, 471 N.W.2d 216 (1991), *cert. denied* ____ U.S. ____, 116 L. Ed. 2d 773, 112 S. Ct. 867 (1992); *Nutbrown v. Munn*, 311 Or. 328, 811 P.2d 131 (1991), *cert. denied* ____ U.S. ____, 116 L. Ed. 2d 773, 112 S. Ct. 867 (1992); *Owner-Operators Independent Drivers Ass'n. of America v. State*, 209 Conn. 679, 553 A.2d 1104 (1989); *Raschke v. Blancher*, 141 Ill. App. 3d 813, 491 N.E.2d 1171 (1986); *Linderkamp v. Bismarck School Dist. No. 1*, 397 N.W.2d

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[5] See *Patsy v. Board of Regents*, 457 U.S. 496 (1982) and *Felder v. Casey*, 487 U.S. 131 (1988) (non-tax cases stating the general rule: exhaustion of administrative remedies is not required under 42 U.S.C. § 1983).

76 (N.D. 1986); *Zizka v. Water Pollution Control Authority*, 195 Conn. 682, 490 A.2d 509 (1985); *Stufflebaum v. Panethiere*, 691 S.W.2d 271 (Mo.banc 1985); *Johnson v. Gaston County*, 71 N.C. App. 707, 323 S.E.2d 381 (1984), *rev. denied* 313 N.C. 508 (1985); *Spencer v. South Carolina Tax Com'n*, 281 S.C. 492, 316 S.E. 2d 386 (1984).

Petitioners urged the Kansas Supreme Court to follow *Hogan v. Musolf*, 157 Wis. 2d 362, 459 N.W.2d 865 (1990), wherein the Wisconsin Court of Appeals had refused to "read McNary as creating any limitation of sec. 1983 actions in state courts." 157 Wis. 2d at 375 n.9. The Kansas Supreme Court noted the case, but rejected its reasoning. *Dean*, 250 Kan. at 424. Apparently, the Kansas Supreme Court was not aware that on June 26, 1991, the Wisconsin Supreme Court reversed the Wisconsin Court of Appeals and held that plaintiffs in a 42 U.S.C. § 1983 action were required to exhaust state tax administrative remedies. *Hogan v. Musolf*, 163 Wis. 2d 1, 471 N.W.2d 216 (1991) *cert. denied* ___ U.S. ___, 116 L. Ed. 2d 773, 112 S. Ct. 867 (1992).

Thus, there is a total lack of authority for the proposition that the exhaustion of plain, adequate and complete state administrative remedies is not required as a prerequisite to filing a 42 U.S.C. § 1983 action in state court to recover taxes. Clearly, there is no conflict among state courts on this issue and, for that reason, it would be inappropriate to grant the petition for certiorari. Moreover, petitioners reliance on *Patsy v. Board of Regents*, 457 U.S. 496 (1982) and *Felder v. Casey*, 487 U.S. 131 (1988) is misplaced because neither were state tax cases.

III. THERE IS NO BASIS FOR THIS COURT TO REVIEW ALLEGED CONFLICTS BETWEEN *WILL v. MICHIGAN DEPT. OF STATE POLICE*, 491 U.S. 58 (1989) AND *McKESSON CORP. v. FLORIDA ALCOHOL AND TOBACCO DIV.*, 496 U.S. 18 (1990).

Below respondents argued that *Will v. Michigan Department of State Police,* 491 U.S. 58 (1989) barred petitioners' claims for monetary damages. However, the Kansas Supreme Court did not address this issue in either *Zarda* or *Dean.* Consequently, a writ of certiorari to the Kansas Supreme Court to resolve any supposed conflict between *Will* and *McKesson* would be inappropriate.

IV. PETITIONERS HAVE NOT SHOWN THAT A CLASS ACTION PROCEDURE IS CONSTITUTIONALLY REQUIRED IN STATE TAX CASES.

Petitioners argue that Kansas administrative remedies are not "full and adequate" or "clear and certain" because class action procedures are not available.[6]

Several federal courts have rejected the argument that state procedures are inadequate under 42 U.S.C. § 1983 because class action procedures are not available in state tax cases. *Melof v. Hunt,* 718 F. Supp. 877, 884-885 (M.D. Ala. 1989); *Waldron v. Collins,* 788 F.2d 736, 738 (11th Cir. 1986), *cert. denied* 479 U.S. 884 (1986), *Coleman v. McLaren,* 631 F. Supp. 749, 762 (N.D. Ill. 1985), *aff'd* 796 F.2d 477 (7th Cir. 1986); *Miller v. Bauer,* 517 F.2d 27, 32 (7th Cir. 1975); *Mandel v. Hutchinson,* 494 F.2d 364, 367 (9th Cir. 1974); *Bland v. McHann,* 463 F.2d 21, 28 n.24 (5th Cir. 1972), *cert. denied* 410 U.S. 966 (1973). Petitioners have not cited a single case stating a different rule.

The general rule is that an action to recover taxes alleged to have been illegally assessed should not be maintained as a class action. 59 Am. Jur. 2d, *Parties,* § 51, p.

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[6] Arguably, class action procedures are available before the state board of tax appeals. Kan. Adm. Reg. 94-2-10 requires the state board of tax appeals to apply the Kansas rules of civil procedure. Kan. Stat. Ann. § 60-223 of the Kansas rules of civil procedure provides for class actions.

454. Where a statutory scheme for protesting taxes provides a complete, adequate and speedy remedy, the district court is without jurisdiction to grant equitable relief in the nature of a class action to all similarly situated taxpayers. See, e.g., *County Tax Levy By Box Butte County,* 220 Neb. 897, 374 N.W.2d 235 (1985); *Charles v. Spradling,* 524 S.W.2d 820 (Mo.banc 1975); *Hansen v. County of Lincoln,* 188 Neb. 461, 197 N.W.2d 651 (1972), *supplemental opinion* 188 Neb. 798, 197 N.W.2d 655 (1972) ("[A] suit cannot be maintained by one taxpayer on behalf of himself and others similarly situated to recover back taxes alleged to have been illegally assessed. In such case each must bring an action on his own behalf."); *Hooks v. Comptroller of Treasury,* 265 Md. 380, 289 A.2d 332 (1972).

Unlike other areas of law such as securities fraud, antitrust and tort claims arising out of common disasters, utilization of the class action device for the adjudication of tax issues has been minimal. The detailed conditions precedent to the maintenance of a tax refund suit would normally preclude employment of the class action in this area. 3B *Moore's Federal Practice,* ¶ 23.02[2.-23]. In *Agron v. Illinois Bell Telephone Company,* 325 F. Supp. 487 (N.D. Ill. 1970), *reversed on other grounds* 449 F.2d 906 (7th. Cir. 1971), *cert. denied* 405 U.S. 954 (1972), plaintiff's allegation that he filed an administrative tax refund action on behalf of himself and all other class members was rejected as insufficient for failure to name the claimants and the amounts due to each.

Most courts which have addressed the issue have either held that a class action lawsuit cannot be used to challenge taxes or that exhaustion of administrative remedies is a prerequisite to class certification in a tax case. *Bischoff v. City of Newport,* 733 S.W.2d 762 (Ky. App. 1987) (an action for a refund of taxes paid may not proceed as a class action; furthermore, the taxpayer must exhaust administrative remedies before seeking a refund judicially);

Hoffman v. Colo. State Bd. of Assessment, 683 P.2d 783 (Colo.banc 1984) (the district court erred in allowing plaintiffs to bring a class action without plaintiffs and class members exhausting administrative remedies provided by the legislature; taxing power is exclusively a legislative function; where the legislature has provided a complete, adequate and speedy statutory remedy for alleged tax irregularities, a taxpayer must exhaust them); *Schoderbek v. Carlson,* 113 Cal. App. 3d 1029, 170 Cal. Rptr. 400 (1980) (plaintiffs in a class action against county officials challenging a property tax lacked standing where they failed to allege that they had exhausted administrative remedies even though plaintiffs argued they should be excused from exhausting administrative remedies because they represented approximately 138,000 homeowners and the court should not require 138,000 homeowners to go through the expense of pursuing their administrative remedies; an injunction, declaratory relief and a writ of mandate were not available when a taxpayer has an adequate remedy at law—a claim for refund followed by a suit for refund); *Conklin v. Town of Southhampton,* 141 A.D.2d 596, 529 N.Y.S.2d 517 (1988) (class action certification is inappropriate in a case where governmental actions are involved and subsequent plaintiffs will be protected under the doctrine of *stare decisis*); *Aronson v. Commonwealth,* 401 Mass. 244, 516 N.E.2d 137 (1987) (class action bypassing administrative remedies to obtain refunds of substantial amounts of money on behalf of numerous unidentified taxpayers should not be allowed).

The theory behind these cases holding that a class action cannot be maintained to recover taxes illegally assessed is that each aggrieved class member has a "complete, adequate and speedy" remedy to contest taxes. Tax cases are unique and individualized—each case can be handled and resolved independently of all others without adversely affecting any other taxpayer's right to relief.

Since at least 1958, class actions to recover taxes not paid under protest have not been allowed in Kansas. *Felton Truck Line v. State Board of Tax Appeals,* 183 Kan. 287, 327 P.2d 836 (1958). *Felton* was applied in *Zarda* and *Dean. Zarda,* 250 Kan. at 369-371; *Dean,* 250 Kan. at 425-426. Petitioners have made no showing that a different rule is required under 42 U.S.C. § 1983.

CONCLUSION

In *Zarda* and *Dean* the Kansas Supreme Court decided no important questions of federal law which in any way conflict with applicable decisions of this Court. Nor, did it decide a federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals. The Kansas Supreme Court simply applied long-standing Kansas case law requiring the exhaustion of administrative remedies in state tax cases. See *Tri-County Public Airport Authority v. Board of Morris County Commissioners,* 233 Kan. 960, 666 P.2d 698 (1983); *State ex rel. Smith v. Miller,* 239 Kan. 187, 718 P.2d 1298 (1986); and *Board of Osage County Comm'rs v. Schmidt,* 12 Kan. App. 2d 812, 758 P.2d 254 (1988). For these reasons, it is respectfully submitted that the petition for writ of certiorari be denied.

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No. 91-1675

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1991

BERNARD A. ZARDA, SR., et al.,
Petitioners,

vs.

STATE OF KANSAS, et al.,
Respondents,

and

JERRY S. DEAN, et al.,
Petitioners,

vs.

STATE OF KANSAS, et al.,
Respondents.

On Petition for Writ of Certiorari to
the Supreme Court of Kansas

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

A. *ZARDA* AND *DEAN* CASES.

MAY A STATE'S STATUTORY TAX SCHEME, CONSISTENT WITH ESTABLISHED PRINCIPLES OF PROCEDURAL DUE PROCESS, REQUIRE EXHAUSTION OF ADMINISTRATIVE REMEDIES AS A CONDITION PREREQUISITE TO RECOVERY OF TAXES PAID?

B. *ZARDA* CASE.

DOES THE NO-EXHAUSTION RULE GENERALLY APPLICABLE TO CLAIMS MADE PURSUANT TO 42 U.S.C. §1983 APPLY TO CHALLENGES TO STATE TAX SCHEMES FILED IN STATE COURT?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS DELIVERED BELOW 2

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASES 3

THE ZARDA CASE 3

THE DEAN CASE 9

REASONS FOR DENYING THE WRIT 13

A. THE KANSAS SUPREME COURT'S DECISIONS IN *DEAN* AND *ZARDA* ARE IN ACCORD WITH ESTABLISHED PRINCIPLES OF PROCEDURAL DUE PROCESS 14

B. THERE IS NO CONFLICT AMONG THE STATES RELATIVE TO THE APPLICATION OF THE §1983 NO-EXHAUSTION RULE TO STATE COURT TAX CHALLENGES 18

CONCLUSION 21

APPENDIX A ..... App. 1

TABLE OF AUTHORITIES

Cases

1983-1984 County Tax Levy by Box Butte Co., 374 N.W. 2d 235 (Neb., 1985) 16

Allegheny PittsburghCoal Co. v. Webster Co., 488 U.S. 336, 344, 102 L.Ed.2d 688, 109 S.Ct. 633 (1989) 6

Aronson v. Commonwealth, 516 N.E. 2d 137 (Mass., 1987) 16

Chaloux v. Killeen, 886 F.2d 247 (Cir.9, 1989) 19

Coleman v. McLaren, 631 F.Supp. 749, 762 (N.D.Ill., 1986), aff'd. 796 F.2d 477 (Cir.7, 1986) 16

Conklin v. Town of Southampton, 529 N.Y.S. 2d 517 (1988) 16

Dennis v. Higgins, 498 U.S. _____, 111 S.Ct. 865, 112 L.Ed. 2d 969 (1991) 20

Duffy v. Wetzler, 555 N.Y.S. 2d 543 (1990) 16

Fair Assessment in Real Estate v. McNary, 454 U.S.100, 137, 70 L.Ed 2d 271, 102 S.Ct.177, (1981) 7, 18

Familias Unidas v. Briscoe, 619 F.2d 391 (Cir.5, 1980) 19

FPC v. Hope Natural Gas Co., 320 U.S. 591, 602, 88 L.Ed. 333, 64 S. Ct. 281 (1944) 6

Hoffman v. Colorado State Board of Assessment, 683 P.2d 783 (Colo., 1984) 16

Johnson v. Johnson Co., Comm'n, 925 F.2d 1299 (Cir.10, 1991) 18

McKesson v. Florida Alcoholic Beverages and Tobacco Div., 496 U.S. 18, 110 L.Ed.2d 17, 110 S.Ct. 2238 (1990) 14, 15, 17, 19

Melof v. Hunt, 718 F.Supp. 877, 884 (M.D.Ala., 1989) 16

Nutbrown v. Munn, 811 P.2d 131, 138-139 (Or. 1991), cert. denied _____ U.S. _____, 116 L.Ed.2d 773, 112 S.Ct. 861 (1992) 18

Patsy v. Florida Board of Regents, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982) 18

Stanley v. Albany Co., 121 U.S. 535, 7 S.Ct. 1234, 30 L.Ed. 1000 (1886) 6

State Ex Rel. Stephan v. Kansas Racing Comm'n, 246 Kan. 708, 719, 792 P.2d 971 (1990) 12

Waldron v. Collins, 788 F.2d 736, 738-9 (Cir.11, 1986), cert. denied, 479 U.S. 884 (1986) 16

Will v. Michigan Department of State Police, 491 U.S. 58, 105 L.Ed.2d 45, 109 S.Ct. 2304, (1989) 19

Wulfkuhle v. State Department of Revenue, 234 Kan. 241, 248, 671 P.2d 547 (1988) 4

CONSTITUTIONAL PROVISIONS AND STATUTES

28 U.S.C. §1341 ..... 16, 18

42 U.S.C. §1983 ..... 5, 7, 11, 13, 14, 16, 18, 19, 20

Kan. Adm. Reg. §92-51-21 ..... 3, 4, 5, 6

Kan. Stat. Ann. 1991 Supp. §74-2426 ..... 7, 8, 12

Kan. Stat. Ann. 1991 Supp. §79-2005 ..... 7, 8

Kan. Stat. Ann. §8-134 3

Kan. Stat. Ann. 1991 Supp. §60-513 ..... 2, 17, 18

Kan. Stat. Ann. §77-420 ..... 2, 3

Kan. Stat. Ann. §77-529 8

Kan. Stat. Ann. §77-601 8

Kan. Stat. Ann. §79-2005 ..... 8, 12, 13, 15

Kan. Stat. Ann. §79-5101 ..... 3, 9

Kan. Stat. Ann. §79-5103 ..... 2, 3

Kan. Stat. Ann. §79-5105 ..... 3, 4, 9, 11, 12

Kan. Stat. Ann. §79-5116 11

Temporary Regulation No. 92-55-2a 4

BOOKS AND PERIODICALS

Wright, Miller & Kane, *Federal Practice & Procedure*, §1785 17

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STATE OF KANSAS, et al.,
Respondents.

On Petition for Writ of Certiorari to
the Supreme Court of Kansas

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Board of County Commissioners of Johnson County, Kansas, and William E. O'Brien, Johnson County Treasurer, respectfully submit the following brief in opposition to petitioners' Petition for Writ of Certiorari to the Supreme Court of the State of Kansas in the above captioned cases.

OPINIONS DELIVERED BELOW

The opinion of the Supreme Court of the State of Kansas in *Zarda v. State* is reported at 250 Kan. 364, 826 P2d 1365.

The opinion of the Supreme Court of the State of Kansas in *Dean v. State* is reported at 250 Kan. 417, 826 P2d 1372.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

In addition to the Constitutional provisions, statutes and regulations cited by Petitioners, Respondents, in accordance with Sup. Ct. R. 14.1(f), have set forth the text of the following additional state statutes in Appendix A: K.S.A. 79-5103; K.S.A. 77-420; and K.S.A. 1991 Supp. 60-513.

STATEMENT OF THE CASES

THE ZARDA CASE

Effective January 1, 1981, most motor vehicles in the State of Kansas became subject to property taxes pursuant to the provisions of K.S.A. 79-5101 et seq., which requires that motor vehicle taxes be paid at the time of the annual vehicle registration pursuant to Chapter 8, Article 1 of the Kansas Statutes Annotated.

K.S.A. 79-5101 et seq. provides that the Kansas Department of Revenue shall annually adopt a valuation schedule for motor vehicles and annually certify the applicable mill levy for each of the 105 counties in the State, which shall be used in computing the tax imposed upon each vehicle. K.S.A. 79-5103 and K.S.A. 79-5105(c). There is virtually no discretion at the local level with respect to the valuation and taxation of motor vehicles.

K.S.A. 8-134 authorized the Department of Revenue to adopt regulations to implement a staggered vehicle registration system, allowing vehicles to be registered throughout the year, thus easing administration of the motor vehicle tax and registration laws. Pursuant to this authority, the Department of Revenue adopted Kansas Administrative Regulation (K.A.R.) 92-51-21, which became effective May 1, 1982. That regulation spreads motor vehicle registrations throughout eleven months of the year (February through December) based on the first letter of the vehicle owner's last name. K.A.R. 92-51-21 was approved as to legality by the Attorney General of the State of Kansas prior to its effective date pursuant to K.S.A. 77-420(c)(2).

Nevertheless, the same Attorney General who had approved the regulation in 1982 issued Opinion No. 90-100 on

Thursday, August 23, 1990, expressing the opinion that K.A.R. 92-51-21 worked a violation of the Equal Protection Clause of the Fourteenth Amendment as against those taxpayers whose surnames began with a letter toward the end of the alphabet.[1]

The problem arises, according to the opinion, as a result of the superimposition of K.A.R. 92-51-21 on K.S.A. 79-5105 which provides for annual 16% depreciation of all motor vehicles. The operation of K.A.R. 92-51-21, according to the opinion, works to delay the application of the 16% depreciation on vehicles owned by taxpayers whose last names start with letters toward the end of the alphabet.

In response to Attorney General Opinion No. 90-100, the Department of Revenue promulgated Temporary Regulation No. 92-55-2a on October 1, 1990, which became effective on January 1, 1991. Petitioners have conceded that the new regulation adequately solves the alleged "alphabet inequity problem." (Pet. 13).

On Monday, August 27, 1990, Petitioners filed their original petition in this case in the District Court of Shawnee County, Kansas, naming as Defendants the State of Kansas; Kansas Department of Revenue; Secretary of Revenue Ed Rolfs, and Steve Stotts, Director of Taxation (R.I, 11). Petitioners thereafter filed their first amended petition, naming as additional parties Defendant the Board of County Commissioners of Franklin; Johnson; Leavenworth; and Wyandotte Counties (R.I, 66).

Relying on Attorney General Opinion No. 90-100, Petitioners alleged that they had been "unlawfully and unconstitutionally discriminated against;" requested the certification of a

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[1]Kansas Attorney General's opinions are not binding upon the courts. *Wulfkuhle v. State Department of Revenue*, 234 Kan. 241, 248, 671 P.2d 547 (1988).

Plaintiffs' and Defendants' class; and sought relief by way of mandamus; declaratory judgment; "Recovery of all monies unlawfully collected through the implementation of the monthly staggered registration scheme;" injunctive relief and an accounting (R.I, 81).

Petitioners later filed a motion for leave to file a second amended petition, in which they alleged that "several Defendants are unclear as to certain claims against them. However, a fair reading of Plaintiffs' first amended petition alleges" a claim under 42 U.S.C. §1983 against the State and County Respondents (R.I, 864-865). It is unclear whether the District Court ever formally ruled on Petitioners' motion; however, the District Court did address the §1983 claim in its memorandum decision filed January 11, 1991 (R.I, 994-999).

On November 21, 1990, Petitioners filed an amended motion for class certification, seeking certification of a Plaintiffs' class defined as "All persons. . .registering for the first time one or more motor vehicles. . .in Kansas as required by. . .K.A.R. 92-51-21 between May 1, 1982 and December 31, 1990, and whose registration month was any month after February." (R.I, 532). In other words, Petitioners sought to certify a class that includes every person who has registered a vehicle in the State of Kansas since May 1, 1982 except those persons whose last names begin with the letter "A". This amended proposed Plaintiffs' class was based on the affidavit of Petitioners' expert, Dr. Richard Hoyt, whose opinion that "Each of the named Plaintiffs have [sic] suffered overcharges as a result of the staggered registration system. . ." is the sole evidence in the voluminous record in this case to support the proposition that the named Plaintiffs sustained damages as a result of the alleged inequity of the staggered registration system (R.I, 582). No attempt was ever made by the named Plaintiffs to set forth an actual amount

of damages that they allegedly incurred. Based upon the factual allegations contained in Petitioners' pleadings, the average "unconstitutional overcharge" for each vehicle in 1990 was $12.28.[2]

In response to Petitioners' petitions, all named Defendants filed motions to dismiss, relying primarily on the ground that Petitioners had failed to exhaust their administrative remedies (R.I, 178; 295; 309; 325; 335). By a memorandum decision filed January 11, 1991, the District Court sustained Defendants' motion (R.I, 991). Petitioners thereafter appealed to the Kansas Court of Appeals. The appeal was transferred to the Kansas Supreme Court on Petitioners' motion.

On February 28, 1992, the Kansas Supreme Court filed its opinion in the case. The Court framed the sole issue on appeal as whether the district court lacked subject matter jurisdiction on the ground that the named Plaintiffs failed to exhaust their administrative remedies. 250 Kan. at 365. Recognizing that the

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[2]Petitioners' expert, Dr. Hoyt, estimated that the "unlawful taxes collected from the Petitioners' class" in 1990 was $25,771,332 (R.I, 815); Petitioners further state that estimated total registrations in 1990 were 2,164,083 (R.I, 66). The Department of Revenue estimated that 65,560 of such 1990 registrations were attributable to "A" taxpayers (R.I, 656). 2,164,083 less 65,560 equals 2,098,523, all of which would fall into Petitioners' proposed class. $25,771,332 divided by 2,098,523 equals $12.28. In their Petition brief, p.16, n.39, Petitioners themselves state that ". . .the average class member's claim in *Zarda* approximates $133," which includes interest, for all nine tax years in which K.A.R. 92-51-21 was in effect. This amounts to a total claim per year of $14.77, inclusive of interest. It is axiomatic that mathematical exactitude is not expected or required in the valuation of property within a class for tax purposes. *Stanley v. Albany Co.*, 121 U.S. 535, 7 S.Ct. 1234, 30 L.Ed. 1000 (1886). See also *Allegheny Pittsburgh Coal Co. v. Webster Co.*, 488 U.S. 336, 344, 102 L.Ed.2d 688, 109 S. Ct. 633 (1989): "'It is not the theory, but the impact, . . .that counts,'" quoting *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602, 88 L.Ed. 333, 64 S. Ct. 281 (1944).

"purpose and ultimate goal of Plaintiffs' challenge is to allow the recovery of motor vehicle taxes paid by them and others," 250 Kan. at 369, the Court held that the district court lacked subject matter jurisdiction to grant Petitioners the prayed-for tax relief by virtue of their failure to exhaust the administrative remedies available to them pursuant to K.S.A. 1991 Supp. 79-2005 and K.S.A. 1991 Supp. 74-2426, 250 Kan. at 374. The Court further held that Petitioners' claims for declaratory and injunctive relief could have been pursued without first exhausting administrative remedies, 250 Kan. at 371, but that those claims were moot because "Plaintiffs' complaints do not extend to any taxation which occurred after December 31, 1990," 250 Kan. at 374. With respect to Petitioners' claim for damages and equitable relief pursuant to 42 U.S.C. §1983, the Kansas Supreme Court held that the rationale expressed in Justice Brennan's concurring opinion in *Fair Assessment in Real Estate v. McNary,* 454 U.S.100, 137, 70 L.Ed 2d 271, 102 S.Ct.177 (1981) applies equally to state court challenges to state taxation systems, and stated that "The Plaintiffs have failed to demonstrate how the remedies provided by K.S.A. 1991 Supp. 79-2005 and K.S.A. 1991 Supp. 74-2426 are unclear, uncertain, incomplete, or inadequate. The Petitioners could have complied with K.S.A. 1991 Supp. 79-2005 and still have pursued their constitutional claims. Although constitutional claims cannot be acted upon by [the Board of Tax Appeals], such claims would be resolved by the district court on appeal." 250 Kan. at 374.

The administrative procedure cited by the Kansas Supreme Court, found at K.S.A. 1991 Supp. 79-2005 and K.S.A. 1991 Supp. 74-2426, requires a taxpayer to file a written protest at the time of payment of his or her taxes or no later than December 20, stating the grounds on which the taxes, or any portion thereof, are protested.

One of the grounds specifically enumerated is an illegal or void valuation or assessment. K.S.A. 1991 Supp. 79-2005(b). Within 15 days of receipt of the tax protest by the county appraiser, an informal meeting must be scheduled. Within five days of the informal meeting, the appraiser must notify the taxpayer of the results thereof. Within 30 days after notification of the results of the informal meeting, the taxpayer must file an application for refund with the Board of Tax Appeals (BOTA), which is docketed and set for hearing no later than 90 days after filing. K.S.A. 1991 Supp. 74-2426 then requires that a final order of BOTA be rendered and served within 120 days after the matter was finally submitted. An aggrieved party must then file a motion for reconsideration in accordance with K.S.A. 77-529. Once the motion for reconsideration is disposed of, the matter is subject to judicial review in accordance with the Act for Judicial Review and Civil Enforcement of Agency Actions, K.S.A. 77-601 et seq. K.S.A. 1991 Supp. 79-2005 provides for tax refunds in meritorious cases.

The Kansas Supreme Court has repeatedly held that an aggrieved taxpayer must exhaust administrative remedies prior to resorting to the courts and that failure to do so deprives the court of subject matter jurisdiction. See cases cited by the Kansas Supreme Court in the *Zarda* opinion, 250 Kan. at pp. 367-368.

Contrary to Petitioners' assertions, Pet. 9 and 12, they had ample time to pursue their administrative remedies. Petitioners first filed their petition in Shawnee County District Court in August, 1990. Pursuant to K.S.A. 79-2005, they had until December 20, or the date they paid their 1990 motor vehicle taxes, whichever was later, to file their protest. As the Kansas Supreme Court observed, Petitioners "could have complied with K.S.A. 1991 Supp. 79-2005 and still have pursued their

constitutional claims. . ." 250 Kan. at 374.

THE DEAN CASE

The statutory scheme for ad valorem taxes on motor vehicles in the State of Kansas that is at issue in *Zarda* is also the basis for the claim made in *Dean*. In *Dean*, however, Petitioners alleged that the mill levy (or county average tax rate, as it is called in the statute at issue) used in tax year 1990 was erroneous. Kansas' statutory scheme for ad valorem taxes on motor vehicles is found at Article 51 of Chapter 79 of the Kansas Statutes Annotated. It was adopted by the legislature in 1979 and became effective in 1980. Taxes were first levied thereunder in 1981.

At issue in *Dean* is K.S.A. 79-5105(c), which states:

> [A tax is hereby levied upon every motor vehicle, as the same is defined by K.S.A. 79-5101. . .which shall be determined by] multiply[ing] the taxable value of the motor vehicle produced under (b) above by the county average tax rate for the next preceding tax year.
>
> The "county average tax rate" for a county means the total amount of general property taxes levied within the county by the state, county and all other taxing subdivisions levying such taxes within such county divided by the total assessed tangible valuation of property within such county as of November 1 of such year as certified by the secretary of revenue.

Beginning in 1981, the first year taxes were levied und K.S.A. 79-5105, the Secretary of Revenue certified coun average tax rates to each of the 105 Kansas counties based

1979 data. Hence, the county average tax rates for 1981 were calculated using total general property taxes and total tangible assessed valuations from 1979 and so on through the present year (R. VIII, Clark TR. 11-15). These county average tax rates are certified annually by the Secretary of Revenue to the Director of Motor Vehicles, both of whom are officers of the Kansas Department of Revenue. The Director of Motor Vehicles uses the information to prepare the tax tables for the collection of motor vehicle taxes (R.VIII, Clark TR., 11). The annual certifications indicate that the county average tax rates for Johnson County for the motor vehicle tax years 1981 to 1992 are as follows:

1981: .105631 (based on 1979 data)
1982: .117549 (based on 1980 data)
1983: .123409 (based on 1981 data)
1984: .122736 (based on 1982 data)
1985: .136064 (based on 1983 data)
1986: .139299 (based on 1984 data)
1987: .141005 (based on 1985 data)
1988: .146833 (based on 1986 data)
1989: .165271 (based on 1987 data)
1990: .177583 (based on 1988 data)
1991: .106749 (based on 1989 data)
1992: .111132 (based on 1990 data)
(R.VII, deposition exhibit 2)

It can readily be seen that, except for 1984 and 1991, the Johnson County average tax rates for motor vehicle taxes went up each year. The annual upward trend of county average tax rates is typical throughout the state. (See *Zarda* record, R. II, Rolfs TR., 49, 53). Petitioners fail to advise this court that, if they are correct that they were overcharged for motor vehicle taxes in 1990, they were also undercharged every prior and subsequent year except

for 1983, including the current year. The Johnson County Treasurer clearly would have the authority to collect past due motor vehicle taxes pursuant to K.S.A. 79-5116 if Petitioners ultimately were to prevail in their interpretation of K.S.A. 79-5105(c), effectively eliminating any recovery for the year 1990.

Petitioners first attempted to bring this action as an original action in mandamus in the Kansas Supreme Court, which was dismissed pursuant to Supreme Court Rule 9.01 on December 7, 1990. On December 10, 1990, counsel for Petitioners filed the *Dean* case in the District Court of Johnson County, Kansas (R.I, 2). In *Dean*, the only county Defendant was William E. O'Brien, Johnson County Treasurer. On January 3, 1991, counsel for Petitioners filed *Underwood, et al. v. State of Kansas, et al.*, in the District Court of Johnson County, Kansas (R.I, 586). In *Underwood*, the named Petitioners named 77 county treasurers, including the Johnson County Treasurer, as party Defendants and additionally claimed that they were entitled to relief under 42 U.S.C. §1983. Otherwise, the *Dean* and *Underwood* petitions are identical.

Petitioners' petitions sought recovery of 1990 motor vehicle taxes on the ground that those taxes were calculated using the wrong mill levy and sought equitable relief by way of mandamus, declaratory judgment and injunction. Inexplicably, Petitioners further alleged in *Underwood* that they were entitled to relief pursuant to 42 U.S.C. §1983. Finally, Petitioners sought certification of a class of all persons who had registered and paid taxes on motor vehicles in 1990 in the 77 counties represented in the action. The 77 county treasurers in *Underwood* were named as parties Defendant because, in those counties, the mill levies dropped in 1989, an aberration attributable to state-wide reappraisal in 1989. (R.I, 605-606). *Dean* and *Underwood* were consolidated before the Honorable Larry

McClain, Johnson County District Court Judge (R.I, 1).

The Respondents filed motions to dismiss based primarily on the ground that Petitioners had failed to exhaust their administrative remedies (R.I, 124; 127; 152; 155; 158; 175; 211). The parties additionally briefed the issue of statutory construction of K.S.A. 79-5105(c) (R.I, 244; 295; 401; 409). By a journal entry filed March 19, 1991, the District Court ruled that it lacked subject matter jurisdiction over Petitioners' claims due to their failure to exhaust administrative remedies (R.III, 3-4). Petitioners thereafter appealed to the Kansas Court of Appeals. The case was transferred to the Kansas Supreme Court on Petitioners' motion.

On February 28, 1992, the opinion of the Kansas Supreme Court was filed. In its opinion, the court identified the issue on appeal as whether the district court lacked subject matter jurisdiction over Petitioners' cause of action on the ground that Petitioners had failed to exhaust their administrative remedies. Recognizing that Petitioners' prayer for equitable relief, as well as tax refunds, was directed solely to the tax year 1990, and further recognizing implicitly that further pursuit of equitable relief beyond 1990 would cause Petitioners' motor vehicle tax liabilities to increase, the Kansas Supreme Court held that exhaustion of administrative remedies as set forth in K.S.A. 79-2005 and 74-2426 is a condition prerequisite to seeking recovery of taxes paid and that Petitioners' prayer for injunctive and declaratory relief was moot. The court did not rule on the statutory construction issue presented in the case, but noted, however, that the legal interpretation of a statute by the agency charged with its interpretation is entitled to "great judicial deference"; 250 Kan. at 422, quoting *State Ex Rel. Stephan v. Kansas Racing Comm'n*, 246 Kan. 708, 719, 792 P.2d 971 (1990). The Court addressed, but did not analyze,

Petitioners' §1983 claim. 250 Kan. at 423-424.

Since Petitioners initially filed this action as an original action in the Kansas Supreme Court in November, 1990, they would have had adequate time to pursue their administrative remedies via K.S.A. 79-2005, which allows tax protests to be filed until December 20 or the date taxes are paid.

REASONS FOR DENYING THE WRIT

As demonstrated herein, the Kansas Supreme Court's decisions in *Zarda* and *Dean*, insofar as they reach federal questions, are completely in accord with decisions of this court, as well as all other courts addressing the same federal questions. The criteria for granting a petition for writ of certiorari as set forth in Supreme Court Rule 10 are wholly absent in the cases at bar.

A. THE KANSAS SUPREME COURT'S DECISIONS IN *DEAN* AND *ZARDA* ARE IN ACCORD WITH ESTABLISHED PRINCIPLES OF PROCEDURAL DUE PROCESS

(*Zarda* and *Dean*)

The first federal question raised in *Zarda* and the only federal question raised in *Dean*[3] is whether a state may, consistent with established principles of procedural due process, require exhaustion of administrative remedies as a condition prerequisite to recovery of taxes paid. This issue has long been settled in this court, most recently in *McKesson v. Florida Alcoholic Beverages and Tobacco Div.*, 496 U.S. 18, 110 L.Ed.2d

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[3]In *Dean*, this Respondent has consistently taken the position that no cause of action under §1983 has been, or could be, stated. In *Dean*, Petitioners complain that the Kansas Department of Revenue allegedly used the wrong mill levy to calculate 1990 motor vehicle taxes, which is an alleged violation of state law, to be sure, but does not implicate any constitutional protection. In their petition in *Underwood*, Petitioners allege that, "...It would be totally unlawful and a violation of constitutional due process if only those persons who uncovered the unlawful tax scheme and filed a timely administrative appeal be paid back. Further, the fact that the plaintiffs and class members are required to pay the taxes in full at the time of registration coupled with the unavailability of interest recovery on the unlawful amounts collected through the administrative process and the lack of a clear and certain post-deprivation remedy results in unconstitutional takings by the Defendants providing remedies to the Plaintiffs pursuant to 42 U.S.C. §1983." The foregoing is the only allegation alluding to §1983 in Petitioners's pleadings in *Dean/Underwood*. This Respondent argued that the fallacy of Petitioners' §1983 allegation was self-proving: If Petitioners were correct that they should not be required to exhaust administrative remedies, then their state court action was their due process; conversely, if Respondents were correct that Petitioners were required to exhaust their administrative remedies to obtain tax refunds, then those remedies constituted their due process. Respondents stand by their analysis of Petitioners' purported §1983 claim and for purposes of this brief, assume that Petitioners have raised an issue relating to the substantive law of procedural due process in the *Dean* case.

17, 110 S.Ct. 2238 (1990), upon which Petitioners heavily rely.

Petitioners imply, but cannot argue, that they themselves were precluded by State law from pursuing the administrative remedies available to them, if they could have established that they were entitled to tax refunds at all. Rather, Petitioners argue that the members of the uncertified class which they purport to represent were precluded from pursuing their administrative remedies due to the "subtle" nature of their substantive claims coupled with the requirement that a taxpayer must pay taxes under protest, or file a protest no later than December 20 of the tax year in question, to be eligible for a tax refund under K.S.A. 79-2005. In *McKesson, supra,* the very case upon which Petitioners most heavily rely, this Court explicitly approved of the imposition of procedural requirements by states upon taxpayers seeking refunds of taxes paid. In that case, the Court states:

> .. .A state's freedom to impose various procedural requirements on actions for post deprivation relief sufficiently meets this concern [over the state's ability to engage in sound fiscal planning] with respect to future cases. *The state might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint. . .*110 S.Ct. at 2254. (Emphasis added).

The foregoing was further explanatory of the Court's comment in Footnote 4 of its opinion, 110 S.Ct. at 2243-4, that, upon remand. . ."the state may invoke, as an independent basis for refusing to provide a refund, Petitioner's failure to comply with a notice requirement that was in effect at the time of Petitioner's tax payments." What is required by the Due Process Clause is a

"clear and certain" post-deprivation remedy that allows taxpayers to obtain tax refunds in a meritorious case. Id. at p. 2251.

The only attack upon the clearness and certainty of Kansas' post-deprivation tax refund procedure that is raised by Petitioners is the unavailability of the class action device. This argument has been soundly rejected by all the courts that have addressed the issue. See *Coleman v. McLaren*, 631 F.Supp. 749, 762 (N.D.Ill., 1986), aff'd. 796 F.2d 477 (Cir.7, 1986); *Waldron v. Collins*, 788F.2d 736, 738-9 (Cir.11, 1986), cert. denied, 479 U.S. 884 (1986); *Melof v. Hunt*, 718 F.Supp. 877, 884 (M.D.Ala., 1989) (state administrative remedies not "inefficient" or "inadequate" within meaning of Tax Injunction Act, 28 U.S.C. §1341, due to lack of class action procedure).

Those state courts that have addressed the issue have uniformly held that, where the named Plaintiffs were otherwise properly before the Court, they could not pursue a class action to recover allegedly illegally assessed taxes. See *1983-1984 County Tax Levy by Box Butte Co.*, 374 N.W. 2d 235 (Neb., 1985) ["The general rule is that an action to recover taxes illegally assessed cannot be maintained as a class action."]; *Hoffman v. Colorado State Board of Assessment*, 683 P.2d 783 (Colo., 1984) ["The general rule is that a Court lacks jurisdiction to grant [tax] relief if a plaintiff has not exhausted his administrative remedies. . .This is especially true in class relief cases. . ."]; *Conklin v. Town of Southampton*, 529 N.Y.S. 2d 517 (1988) ["Class certification was inappropriate where government actions are involved and subsequent plaintiffs will be adequately protected by the doctrine of stare decisis. . ."]; *Duffy v. Wetzler*, 555 N.Y.S. 2d 543 (1990) [In §1983 action,. . ."A class action may not be used to protect members of the proposed class who paid the tax without registering a protest. . ."]; *Aronson v. Commonwealth*, 516 N.E. 2d 137 (Mass., 1987) [In a Commerce

Clause challenge to state tax, "where. . .an attempt is made to obtain refunds of substantial amounts of money on behalf of numerous unidentified taxpayers, the procedures of the administrative process should not be bypassed. . .A class should not be certified in actions of this character."]

In arguing that class action relief is mandated by the Due Process requirement of "clear and certain" retrospective tax relief, Petitioners put the cart before the horse. Petitioners, and those taxpayers whom they would represent, consistent with the mandates of procedural due process, may be required to seek such monetary relief in accordance with a State's established administrative procedure prior to being entitled to seek their legal remedies in the Courts. To hold otherwise not only would be illogical, since the Courts always have broad discretion in deciding whether or not to certify a class, see generally, Wright, Miller & Kane, *Federal Practice & Procedure*, §1785, but also would constitute a threat to a government's financial stability, and ultimately to the well-being of its citizens. *McKesson, supra*, 110 S. Ct. at 2250-2251.

Finally, Petitioners argue that "No statute of limitations stands in the way of Petitioners' claims for refund," thus justifying their inflated representations of the amounts of their claims, both individually and class-wide. No Kansas statute expressly provides for a limitation period in which to bring an action for recovery of taxes paid. However, it is inconceivable that the Kansas Courts would conclude that no Kansas statute of limitation would otherwise apply to Petitioners' claims, assuming that compliance with the administrative procedure's timetable was not required. The most appropriate would appear to be K.S.A. 1991 Supp. 60-513, a two-year statute of limitation applicable to, inter alia, "an action for taking, detaining or injuring personal property, including actions for the specific recovery thereof,"

and "an action for injury to the rights of another, not arising on contract, and not herein enumerated." K.S.A. 1991 Supp. 60-513 is additionally applicable to §1983 actions arising in Kansas. *Johnson v. Johnson Co. Comm'n*, 925 F.2d 1299 (Cir.10, 1991).

B. THERE IS NO CONFLICT AMONG THE STATES RELATIVE TO THE APPLICATION OF THE §1983 NO-EXHAUSTION RULE TO STATE COURT TAX CHALLENGES

(ZARDA)

Contrary to Petitioners' assertions, those state courts that have addressed the issue have uniformly held that the no-exhaustion rule as enunciated in *Patsy v. Florida Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982) does not apply to §1983 damages claims challenging state tax schemes filed in state courts. See cases collected in Brief of Respondents State of Kansas, et al., p. 9. These state court decisions have relied principally on *Fair Assessment in Real Estate Assn. v. McNary*, 454 U.S. 100, 70 L.Ed.2d 271, 102 S.Ct. 177 (1981), in which this Court held that principles of comity prohibit a federal court from entertaining §1983 damages claims for the same policy reasons that the Tax Injunction Act, 28 U.S.C. §1341, prohibits federal courts from entertaining claims for equitable relief in actions challenging state taxation schemes. The common rationale underlying these state court decisions was recently articulated in *Nutbrown v. Munn*, 811 P.2d 131, 138-139 (Or. 1991), cert. denied _____ U.S. _____, 116 L.Ed.2d 773, 112 S.Ct. 861 (1992), in which the Oregon Supreme Court stated:

> We understand *McNary* to hold that, given

> the prime importance of non-interference with state taxing practices, Congress' purposes in enacting 42 U.S.C. §1983 will not be defeated by requiring that complaining taxpayers first exhaust their state administrative remedies. If Congress' purposes will not be defeated by such a requirement in federal court, we cannot conceive how those purposes would be any more thwarted by imposition of precisely the same kind of procedural requirement when the §1983 action is brought in state court. . .

The Kansas Supreme Court applied the same rationale to the cases at bar.

Finally, Petitioners urge as another basis for granting certiorari that there is a "conflict" between *Will v. Michigan Department of State Police*, 491 U.S. 58, 105 L.Ed.2d 45,109 S.Ct. 2304, (1989), which held that states are not "persons" for purposes of §1983, and *McKesson, supra*. In response, these Respondents are obliged to point out that the Kansas Supreme Court did not address the issue presented in *Will* in either *Dean* or *Zarda* and for this reason alone, Petitioners' argument based thereon is not appropriate.[4] In addition, contrary to Petitioners' argument, there is no conflict between *Will* and *McKesson* because the latter case was not a §1983 case. It is one thing to raise a constitutional argument, and another to allege a cause of action under §1983, a distinction Petitioners have yet to recognize. If there is any seeming conflict between *Will* and any

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[4]The County Defendants argued that no §1983 damages claim would lie against them because Plaintiffs' alleged damages arose out of the application of state law administered by state officials pursuant to state regulations. See *Chaloux v. Killeen*, 886 F.2d 247 (Cir.9,1989) and *Familias Unidas v. Briscoe*, 619 F.2d 391 (Cir.5, 1980). Contrary to Petitioners' statement in their Petition, p. 25, the County defendants did not argue that *Will* applied to them.

subsequent decisions of this Court of the type contemplated by Petitioners it is with *Dennis v. Higgins*, 498 U.S. _____, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991), in which a majority of this Court recognized the Commerce Clause as a basis for a §1983 claim in a case brought against state officials in a state court. However, *Dennis v. Higgins* clearly contemplated the cognizability of a claim for prospective relief under §1983 against state officials, thus coming under the footnote 10 exception in *Will*.

CONCLUSION

The *Dean* and *Zarda* decisions of the Kansas Supreme Court are in complete accord with the decisions of this Court and with all other state and federal courts that have addressed the same issues. These Respondents respectfully request that the Petitioners' Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX A

Excerpts from Kansas Statutes Annotated

K.S.A. 1991 Supp. 60-513. Actions limited to two years. (a) The following actions shall be brought within two years:

(1) An action for trespass upon real property.

(2) An action for taking, detaining or injuring personal property, including actions for the specific recovery thereof.

(3) An action for relief on the ground of fraud, but the cause of action shall not be deemed to have accrued until the fraud is discovered.

(4) An action for injury to the rights of another, not arising on contract, and not herein enumerated.

(b) Except as provided in subsection (c), the causes of action listed in subsection (a) shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonable ascertainable to the injured party, but in no event shall an action be commenced more-than 10 years beyond the time of the act giving rise to the cause of action.

(c) A cause of action arising out of the rendering of or the failure to render professional services by a health care provider shall be deemed to have accrued at the time of the occurrence of the act giving rise to the cause of action, unless the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably

ascertainable to the injured party, but in no event shall such an action be commenced more than four years beyond the time of the act giving rise to the cause of action.

(d) The provisions of this section as it was constituted prior to July 1, 1987, shall continue in force and effect for a period of two years from that date with respect to any act giving rise to a cause of action occurring prior to that date.

K.S.A. 77-420

(b) Every rule and regulation proposed by any state agency which has been approved by the secretary of administration as provided in subsection (a) before being adopted or filed shall be submitted to the attorney general for an opinion as to the legality of the same, and the attorney general shall promptly furnish an opinion as to the legality of the proposed rule and regulation so submitted. Every rule and regulation submitted to the attorney general under this subsection (b) shall be accompanied by a copy of any document which is adopted by reference by the rule and regulation. Every rule and regulation approved by the attorney general under this subsection (b) shall be stamped as approved and the date of such approval shall be indicated therein.

(c) No rule and regulation shall be filed by the secretary of state unless:

(1) The organization, style, orthography and grammar have been approved by the secretary of administration;

(2) the rule and regulation has been approved in writing by the attorney general as to legality;

(3) the attorney general finds that the making of such rule and regulation is within the authority conferred by law on the state agency submitting the same;

(4) the rule and regulation has been formally adopted by the state agency after it has been approved by the secretary of administration and the attorney general and is accompanied by a certified or other formal statement of adoption when adoption is by an executive officer of a state agency, or by a certified copy of the roll call vote required for its adoption by K.S.A. 77-421, and amendments thereto, when adoption is by a board, commission, authority or other similar body;

K.S.A. 79-5103

For the year 1981 and thereafter, the department of revenue shall annually adopt a schedule for determining the value of all motor vehicles, the model year of which is 1981 or thereafter, as of the time they are first offered for sale as new motor vehicles. Such schedule shall be adopted as a part of the rules and regulations adopted by the secretary of revenue for such purpose. Such schedule shall show the classification of all such motor vehicles in accordance with K.S.A. 79-5104 based upon the value so determined. In formulating such schedule, the secretary may use the trade-in value for each particular make and model as developed form national market reports or other similar, nationally recognized publications.

In the event the secretary of revenue is unable to ascertain a value by this method in respect to any motor vehicle by reason of the same being a specifically constructed motor vehicle, or for any other reason, the county appraiser shall determine, from any information available, a comparable value of such vehicle pursuant to rules and regulations adopted by the secretary of revenue for such purpose.

(b) The classification determined by the county appraiser under the provisions of subsection (c) of K.S.A. 79-5102 shall be used in computing the tax imposed upon such motor

vehicles in the year 1981 and each year thereafter.

(c) The county appraiser shall classify all motor vehicles, the model year of which is 1980 or prior thereto, which are registered for the first time in the state or the registration of which is transferred in the year 1981 or thereafter, in accordance with the schedule provided by the secretary of revenue for the classification of motor vehicles by such appraiser in the year 1980 as provided in subsection (c) of K.S.A. 79-5102. Such classification shall be used in computing the tax imposed upon such motor vehicles in the year of their first registration or transfer and each year thereafter.

(d) The county appraiser shall classify all motor vehicles, the model year of which is 1981 or thereafter, in accordance with the schedules provided by the secretary of revenue for such purpose under the provisions of subsection (a) of this section. Such classification shall be used in computing the tax imposed upon such motor vehicles in the year of registration or transfer and each year thereafter.

(3)

No. 91-1675

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

BERNARD A. ZARDA, SR., et al.,

Petitioners,

vs.

STATE OF KANSAS, et al.,

Respondents.

and

JERRY S. DEAN, et al.,

Petitioners,

vs.

STATE OF KANSAS, et al.,

Respondents.

Petition For Writs Of Certiorari To The Supreme Court Of The State Of Kansas

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION FILED BY THE KANSAS DEPARTMENT OF REVENUE

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PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION FILED BY THE KANSAS DEPARTMENT OF REVENUE

One critical misrepresentation is contained at pages 6 and 10 of Respondents' Brief In Opposition filed on behalf of the Kansas Department of Revenue.[1] At page 6 the Kansas Department of Revenue states:

> "The Kansas rules of civil procedure and evidence are applicable to procedures before the state board of tax appeals." (Footnote reference is made to Kan. Adm. Reg. 94-22-10.)

Respondents, however, did not provide a copy of Kan. Adm. Reg. 94-2-10 to assist the Court. Therefore, Petitioners, by Appendix J hereto, submit that regulation for the Court's consideration.

It can be seen that the *only* reference in Kan. Adm. Reg. 94-2-10 is contained in sub-paragraph (c), which reads as follows:

> "**The rules of evidence** as set forth within the code of civil procedure of this state, and particularly **Article 4, Chapter 60, Kansas Statutes Annotated, may** be followed by the board in its proceedings; however, the **rules of evidence**

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[1] At this time it is not clear to Petitioners whether additional responses will be filed on behalf of other Respondents. However, since Supreme Court Rule 15.5 indicates that the entire matter may be submitted to the Court upon receipt of Respondents' brief, Petitioners hesitate to wait in filing this Reply. Additional replies may be forthcoming if deemed appropriate when additional Respondents' briefs in opposition are filed.

> may be modified if it will be in the public interest to do so and will aid in ascertaining the facts. In all cases the rules of civil procedure shall not be used in a highly technical manner and all parties shall remain aware that proceedings before the board are administrative proceedings and not proceedings before a district court of this state." (Emphasis added.)

Article 4 of the Kansas Statutes Annotated specifically relates to the Kansas rules of ***evidence*** only. The class action procedures are contained in Article 2.[2] Therefore, the Respondents' brief is in error and critically misleading. Indeed, throughout these proceedings the exact opposite position has been taken by Respondents. Moreover, the Kansas Supreme Court in the *Zarda* and *Dean* opinions had every opportunity to afford Petitioners class action relief before the Board of Tax Appeals, but did not do so. Further, the statement in footnote 4 at page 7 of the Kansas Department of Revenue's brief that numerous tax protests were "spawned" by the Attorney General's Opinion is totally unsupported by the record below.

CONCLUSION

Petitioners urge the Court not to be mislead by the erroneous references at pages of 6 and 10 of the Kansas Department of Revenue's brief. The fact is that *no* class

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[2] See, Appendix E-2 of the *Petition for Writs of Certiorari.*

relief, whatsoever, is available once the taxpayer starts down the tax protest trail. (See, *Petition for Writs of Certioruri* at pages 12 & 13.)

Respectfully submitted,

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APPENDIX J

KANSAS BOARD OF TAX APPEALS

94-2-10. Hearing procedure. (a) Any party may appear at any hearing or other proceeding before the board and be heard in person or the party may appear and be represented by an attorney who is regularly admitted to practice in the supreme court of the state of Kansas. Any party may be represented by out-of-state counsel if counsel has complied with the rules of the Kansas supreme court relative to the admission of foreign attorneys. An elected or appointed officer of a county, city or other taxing district may appear on behalf of the county, city or taxing district, except where a statute or the board prohibits an appearance by an elected or appointed officer and requires the county, city or other taxing district to be represented by an attorney regularly admitted to practice in the supreme court of the state of Kansas. This exception shall not prohibit an elected or appointed officer of a county, city or other taxing district from testifying on behalf of the county, city or other taxing district.

(b) All pre-trial hearings shall be conducted by one or more members of the board. Any rulings made by a board member at any pre-trial conference shall be subject to approval and ratification by the remainder of the board.

(c) In the event of a backlog in the board's docket of cases awaiting hearing, the board may, in its discretion, take evidence in any matter before it by means of a hearing panel consisting of one or more members of the

board. Any decision shall be made by at least three members of the board.

(d) On the date and at the place and time stated in the notice of hearing, the chairperson or the member delegated to preside over the hearing, hereinafter referred to as "presiding member," shall have the docket called. The chairperson or presiding member may make a statement as to the scope and purpose of the hearing at the opening of the hearing. All parties or witnesses who are to testify, except attorneys duly admitted to practice, shall be sworn by the reporter, the secretary of the board or by any member of the board.

(e) The rules of evidence as set forth within the code of civil procedure of this state, and particularly Article 4, Chapter 60, Kansas Statutes Annotated, may be followed by the board in its proceedings; however, the rules of evidence may be modified if it will be in the public interest to do so and will aid in ascertaining the facts. In all cases the rules of civil procedure shall not be used in a highly technical manner and all parties shall remain aware that proceedings before the board are administrative proceedings and not proceedings before a district court of this state.

(f) When objection is made to the admissibility of any evidence before the board or as to the validity of any proceeding before the board, the presiding board member may rule upon the objection immediately or the evidence or procedure may be admitted or permitted subject to a subsequent ruling by the board. The presiding member may exclude inadmissible evidence and may order the presentation of cumulative evidence to be discontinued.

(g) At hearings upon appeals or applications, the applicant or the appellant shall open and close. At hearings initiated by the board, the staff attorney for the board shall open and close or the board may order some noticed and appearing party to present evidence. Witnesses for each party shall be examined in the order determined by that party, orally and under oath. All opposing parties shall be entitled to cross examination. To facilitate the orderly and expeditious conduct of hearings, the presiding member may appoint one of the board's staff attorneys to assist procedurally any individual taxpayer not represented by counsel. Such assistance shall not extend to assisting the taxpayer in presenting the taxpayer's case or advising the taxpayer as to the substantive nature of their case: but shall be confined to procedural assistance.

(h) All proceedings shall be recorded by a court reporter retained by the board for that purpose or other recording device, unless waived by the parties. Any such record shall be the only record of any proceeding before the board, other than the contents of the board's files, evidence admitted by the board and matters administratively noticed by the board. Transcripts of any proceedings before the board may be obtained upon request to the board and upon paying the costs of providing the transcripts.

(i) The use of recording, photographic or television devices during any proceedings before the board are authorized, pursuant to the provisions of K.S.A. 75-4318(e). To insure orderly proceedings in hearings before the board and in order to minimize the detrimental

effects on the testimony of witnesses, cameras, photographic lights and recording devices shall be permitted during the sworn testimony of witnesses only as long as the use of such devices is not disruptive to the witnesses and the proceedings.

(j) Administrative notice of the board's public records and those of any state, local or federal government entity, as well as those universally accepted facts properly cognizable by administrative notice, may be taken by the board in all hearings before it.

(k) The submission of briefs and proposed findings of facts and conclusions of law may be required by the board at the conclusions of any hearing and any party desiring to submit the same may do so in all cases. The time for filing of such documents and any reply briefs shall be fixed by the board at the conclusion of the hearing. The original and six copies of these documents shall be filed with the secretary of the board and copies shall be served on all interested parties. Proof of service shall be filed as required in these rules. (Authorized by K.S.A. 74-2437; implementing 74-2436, 74-2437a, 74-2437b, K.S.A. 1986 Supp. 75-4318; K.S.A. 12-110a, 19-431, K.S.A. 1986 Supp. 79-213, K.S.A. 79-1103 as amended by L. 1987, Ch. 319, Sec. 5, 79-1105a, 79-1409, 79-1413a, K.S.A. 1986 Supp. 79-1478, K.S.A. 1986 Supp. 79-1481, K.S.A. 79-1609, K.S.A. 1986 Supp. 79-1702, K.S.A. 79-1964a, 79-1964b, K.S.A. 1986 Supp. 79-2005, K.S.A. 79-2938, 79-2939, 79-2941, 79-2951, 79-5013, 79-5016, K.S.A. 1986 Supp. 79-5033; effective May 1, 1981; amended May 1, 1987; amended May 1, 1988.)